Supreme C
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No. 80-429

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether sex-based wage rate discrimination claims are subject to a different standard of proof, when such claims are asserted under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-1 to 2000e-17 (1976), than the equal pay for equal work standard applicable to claims presented under the Equal Pay Act, 29 U.S.C. §206(d)?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are listed in the caption to this Brief.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20a) and its supplemental opinion on denial of rehearing (Pet. App. 1a) are reported at 623 F.2d 1303. The court of appeals' judgment reverses in pertinent part the decision of the United States District Court for the District of Oregon (Pet. App. 57a) which is not yet officially reported but is unofficially reported at 20 F.E.P. Cases 788.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1979. the court of appeals' order denying the petition for rehearing and suggestions for rehearing in banc was filed on May 1, 1980. On July 21, 1980, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to September 2, 1980. Petitioners filed a petition for writ of certiorari on September 2, 1980. This Court granted the petition for writ of certiorari on November 3, 1980. The jurisdiction of

this Court is invoked under 28 U.S.C. §1254 (1).

STATUTES AND REGULATIONS INVOLVED

The statutes involved are as follows: Section 6(d)(1) of the Fair Labor Standards Act of 1938, as added by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. §206(d)(1); Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 78 Stat. 255, 42 U.S.C. §2000e-2(a)(1); and Section 703(h) of Title VII, 78 Stat. 255, 42 U.S.C. §2000e-2(h), the last sentence of which is known as the Bennett Amendment. The regulations involved are two regulations of the federal Equal Employment Opportunity Commission ("EEOC"): (1) 29 C.F.R. §1604.7(a) (1966), part of the EEOC's "Guidelines on Discrimination Because of Sex", initially published at 30 Fed. Reg. 14928 (1965); and (2) 29 C.F.R. §1604.8 (1979), issued on April 5, 1972 and originally published in 37 Fed. Reg. 6836 (1972). These statutes and regulations are set forth in App. A hereto.

STATEMENT OF THE CASE

The underlying dispute in this case relates to a pay differential between the "Matron" job respondents performed and the "Corrections Officer"[1/] job performed by certain male employees.[2/] Respondents initially alleged in the Complaint and Pretrial Order that the County had violated Title VII by denying Matrons the same pay received by the Corrections Officers, assertedly because the Matron job and Corrections

1 The Corrections Officer job was initially performed by deputy sheriffs and later by Corrections Officers who were not deputies. The ultimate conclusions of the lower courts were the same with respect to both classifications. They are referred to herein under the single title of Corrections Officer.

2 Matrons' duties included guarding female prisoners at the Washington County jail, while Corrections Officers guarded male prisoners at the jail. (Pet. App. 59a). As shown below, while the two jobs involved some similar duties, the jobs were not substantially equal when all job duties were considered, as found by the district court and affirmed by the Court of Appeals (Pet. App. 68a, 27a-28a).

Officer job were substantially equal. (J. A. 1,11).[3/] However, in their post trial brief the respondents also contended that even if the Matron job and Corrections Officer job were not substantially equal, the County had still violated Title VII since the pay differential between the jobs was too great based on respondents' assessment of the relative difficulty of the jobs. (Pet App. 69a)

The district court found that the Matron job was not substantially equal to the Corrections Officer job because of the differences in the number of prisoners guarded and the fact that the matrons actually performed clerical work much of the time. (Pet. App. 59a-60a,

3 The district court held that it had jurisdiction of the suit under Title VII (Pet. App. 65a-66a). In addition to their alleged wage rate discrimination claim, the respondents also claimed that the County in violation of Title VII had terminated and refused to rehire them because they had sought equal pay. The district court found in favor of the County with respect to those claims (Pet. App. 70a-73a) and the court of appeals affirmed (Pet. App. 43a-49a). Respondents did not seek review in this Court of any part of the judgment below.

68a-69a) Accordingly, the district court dismissed the claim alleged in the Complaint. (Pet. App. 68a-69a, 73a) With respect to the respondents' alternative claim -- that the County had vilated Title VII with respect to the wage rates even if the jobs were not substantially equal -- the district court held that claims of sex-based wage discrimination under Title VII must meet the Equal Pay Act's "equal work" standard. The district court dismissed the alternative claim as a matter of law since the two jobs were substantially dissimilar. (Pet. App. 70a).

The court of appeals held that the district court was correct in finding that the comparison jobs were not substantially equal (Pet. App. 27a-30a). However, the court of appeals decided that even though respondents could not satisfy the "equal work" standard they should be permitted to show that they were entitled to higher pay under some other, unspecified standards. Accordingly, the court of appeals reversed the dismissal of respondents alleged wage rate claim and ordered the district court on remand to consider respondents'

allegation "that a portion of the discrepancy between their salaries and those of the male guards could be ascribed only to sex discrimination." (Pet. App. 39a). In the Supplemental Opinion On Denial Of Rehearing the court of appeals indicated that if female employees could show a violation of the equal pay for equal work standard they could prevail under Title VII, but if they could not show equal work then they still might obtain recovery under other unspecified theories. (Pet. App. 17a-18a).

SUMMARY OF ARGUMENT

The legal issue presented by this case is an important one since it will determine whether the federal judiciary will become involved in adjudicating sex-based wage rate discrimination claims, other than in situations where men and women are alleged to be performing the same job but are being paid differently. Until the decision below, no court had held that such involvement was proper. Such involvement would be a significant departure from the role that

until now has been played by the federal courts. In administering the equal work standard, which was set forth in the Equal Pay Act and has previously been viewed as incorporated into Title VII, the federal bench has not been determining the wage rate that is proper for any particular job nor has it been adjudicating the amount of the wage differential that would be appropriate between two different jobs. Rather it has been assuring that whenever a male and female are performing the same work they are paid equally. The social, political, and economic consequences of involving the federal judiciary in determining the propriety of wage rate relationships between different jobs and in adjudicating the legality of an employer's wage structure are obviously very serious, as discussed infra at 14-31 and 98-109. If the equal work standard is abandoned as a limitation upon the type of sex-based wage discrimination claims that can be asserted under Title VII, the federal courts will inevitably become tribunals for complex, and often massive, job evaluation trials to attempt to discern whether it was sex discrimi-

nation or some non-discriminatory factor that caused the wage levels to be set where they are.

Respondents and the Ninth Circuit presumably would argue that the dangers of potential sex discrimination are great enough to outweigh the social, political, and economic concerns which militate against such federal involvement in wage setting. However, those arguments should be addressed to Congress, rather than the Courts. Congress is the appropriate forum to evaluate such social, political, and economic considerations And, as we discuss below, Congress has already formulated its judgment on this very issue in the early 1960's. The Ninth Circuit failed to consider much of the relevant legislative history of this point, particularly the directly relevant legislative history of the Equal Pay Act.

In its eighteen months of deliberations upon the Equal Pay Act, Congress carefully developed and explicitly indicated its intention that the federal courts not become involved in an employer's wage structure except to the limited extent of assuring that males

and females would be paid equally for performing the same work. The original bills would have permitted federal court involvement whenever men and women were performing "comparable work". However, Congress amended that legislation to limit federal involvement to the equal work situation in recognition of the same type of considerations discussed above regarding interference with the employers' prerogative to establish their own wage structures as long as men and women were paid the same when performing the same work.

Under the principles of in pari materia statutory construction and prior decisions of this Court, when a prior enactment (especially one dealing with a specific subject) reflects Congressional intent on a matter also covered by a later statute (especially a more general statute) -- it is presumed that the Congressional intent reflected in that prior enactment will control absent a specific statement in the later statute to the contrary. Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976); United States v. United Continental Tuna Corp., 425 U.S. 164, 169 (1976); Train

v Colorado Pub Int. Research Group, 426 U.S. 1 (1976).

There was no such statement in the enactment of Title VII which indicated that Congress intended to reverse its intention reflected in the Equal Pay Act of just one year prior.[4] Actually, whenever the subject arose it was indicated that the equal work standard would continue to be the applicable standard. Senator Clark, the floor manager of the bill, made that clear in his explanations months before Senator Bennett proposed his amendment to Section 703(h). When Senator Bennett proposed his amendment he indicated that its purpose was to preserve the "careful study" of the prior year so that "the provisions of the Equal Pay Act shall not be nullified."[5] Congressman Celler, sponsor of the bill in the House, explained in this regard how the Bennett Amendment provided that compliance with the Equal Pay Act would

4 The same Congress enacted both statutes.

5 See discussion infra at 53-54.

also satisfy Title VII, and on the basis of that explanation the House accepted the Bennett Amendment. However, the Court below did not consider the principles of in pari materia statutory construction. It also erroneously interpreted the language of the Bennett Amendment as intending to incorporate the four affirmative defenses found in the Equal Pay Act but not the core provision, the equal pay for equal work standard. The Ninth Circuit so ruled notwithstanding the fact that (a) there was no reference in the legislative history of Title VII to preserving the Equal Pay Act "affirmative defenses" while there was concern expressed for preserving the basic equal work standard and (b) the Ninth Circuit was apparently unaware that those affirmative defenses were already available under the provisions of Title VII as it existed before the Bennett Amendment was offered. The court below misread and erroneously relied upon a single unclear comment by Senator Dirksen in 1964 that was not even referring to the Equal Pay Act's affirmative defenses. In subsequent legislative history in 1965, Senator

Dirksen and Senator Bennett both explicitly indicated that the Bennett Amendment was intended to mean that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act. The Ninth Circuit held that it could not consider such comments, relying upon a misperception of this Court's decision in Galvan v. Press, 347 U.S. 522 (1954). In Galvan this Court in fact relied upon a 1951 memorandum by Senator McCarran in interpreting a 1950 statute which he sponsored. 347 U.S. 526-7.

Similarly, the administrative interpretation of the Bennett Amendment made contemporaneously with enactment of Title VII, by the Equal Employment Opportunity Commission, supports Petitioner's reading of the statute. In its 1965 guidelines and opinion letters the EEOC viewed the Bennett Amendment as incorporating the equal work standard, not merely the affirmative defenses. Those official interpretations made clear the EEOC's contemporaneous view that the Bennett Amendment "incorporate[d] the definition of discrimination

in compensation found in the Equal Pay Act."6/ the EEOC"s current view may be different. However, as this Court has previously emphasized in a virtually identical situtation, it is the agency's contemporaneous view that is entitled to deference. General Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976). See also Udall v. Tallman, 380 U.S. 1 (1965). The General Electric decision, which was essentially ignored by the Ninth Circuit, also directly supports Petitioner's interpretation of the statute. In that case the Court interpreted the Bennett Amendment as incorporating the entire equal pay for equal work standard of the Equal Pay Act, after emphasizing how the legislative history of Title VII's prohibition of sex discrimination was notable for its brevity but that, through the Bennett Amendment, Congress had paid special attention to the provisions of the Equal Pay Act, 429 U.S. at 143-44. Thus Petitioner submits that Congress made a judgment that the federal courts were to be involved in sex-based wage rate claims only when it is alleged that discrimination exists between persons

6 See discussion infra at 79.

performing the same work, although the courts would be fully involved in assuring equal access to all jobs. Petitioner further submits that if that judgment is to be changed, it should only be done by Congress.

ARGUMENT

I. ADOPTION OF THE EQUAL WORK STANDARD IN THE EQUAL PAY ACT WAS THE PRODUCT OF EIGHTEEN MONTHS OF HEARINGS, COMMITTEE WORK, AND FLOOR DEBATE, AND INDICATED CONGRESSIONAL INTENT THAT FEDERAL COURTS NOT BECOME INVOLVED IN WAGE RATE CLAIMS OTHER THAN IN EQUAL WORK SITUATIONS

The Equal Pay Act was the first federal legislation dealing with discrimination in wage rates. As the product of eighteen months of Congressional deliberations on the subject, it is entitled to great weight in interpreting the meaning of the sex discrimination provisions of Title VII. This is particularly true since there was no discussion of the issue of sex discrimination in the hearings or committee reports on Title VII. Similarly, there was no discussion of the subject of discrimination in the setting of wage rates for jobs in the hearings or

committee reports on Title VII.[7]

The Equal Pay Act on the other hand, considered the entire spectrum of alleged sex discrimination in wage rates. The ramifications of federal involvement in this area then as well as now, were of great magnitude in regard to both the economic consequences of revision wage scales as well as the socio-political considerations of having the federal courts involved in the wage setting process.[8] The Court below took the

7 It is not surprising that wage rate discrimination was not discussed in the hearings and debates on Title VII because that problem was essentially a sex-related problem, as discussed infra at 19.

8 The economic consequences of discarding the limitations of the equal work standard are difficult to calculate precisely. It was estimated by Fortune Magazine in 1978 that: "to raise the aggregate pay of the country's 27.3 million full-time working women high enough so that the median pay for women would equal that of men would add a staggering $150 billion a year to civilian payrolls." "The EEOC's Bold Foray Into Job Evaluation," Fortune, September 11, 1978, at 59. This estimate of such an increase in pay level is consistent with the 1977 (cont.)

(cont.)
difference in median wage levels of working men and women of $60,008. See U.S. Dept. of Labor, The Earnings Gap Between Men and Women (1979), at 6 (Table 1). Even if the increase in payroll costs were not a great as the above estimate, they would still be signficant. Of course, disregarding the equal work standard also has serious economic implications far beyond the increase in payroll costs. See, Lindsay, Equal Pay for Comparable Work: An Economic Analysis of a New Anti-discrimination Doctrine (1980), published by the Law and Economics Center of the University of Miami. Professor Lindsay cautions against the dangers of "[a]rbitrary manipulation of wage rates" and explains that governmental involvement in the wage area could result in "counterproductive effects," such as an overall loss of jobs. Id. at 33-34. Professor Lindsay concluded that "wage determination in different occupations is a complex, simultaneous process" and that "even in the absence of prejudice, and when performed under conditions of equal skill, effort, and responsibility, the real market value of dissimilar work can differ markedly." Id. at 3-4. A paper by George H. Hildebrand, Director of Cornell University's Center for the Study of American Political Economy, raises very similar concerns regarding the serious economic ramifications of abandonment of the equal work limitations and the ensuing governmental involvement in wage structures. Hidlebrand, "The Market System," in Comparable Worth: Issues and Alternatives, 105-6 (E.R. Livernash ed. 1980).

position that there should be a broad interpretation of the reach of Title VII in the wage area. In doing so it ignored the clear Congressional judgment reflected in the Equal Pay Act that there should be only limited federal involvement in an employer's wage rates. In fact, after much deliberation, Congress specifically amended the Equal Pay Act to preclude comparison in the wage rates of jobs which involve different work content. This Court has previously recognized the relevance of Congress' determinations in the Equal Pay Act to the interpretation of Title VII in the area of sex discrimination in wage rates.9/ Thus, the legislative history of the Equal Pay Act is a fitting subject with which to open our inquiry.

The problem of dealing with allegations of wage discrimination was fully presented by and explored by Congress in the course of the hearings and debates which led to the Equal Pay Act. That Act was the product of the 87th Congress and the first session of the 88th Congress. During the 87th Congress, Representatives

9 General Electric Co. v. Gilbert, 429 U.S. 125, 144 (1976).

Green and Zelenko introduced H.R. 8898 and H.R. 10226 respectively. These bills were identical and represented Administration proposals for equal pay legislation. Both bills stated in pertinent part:

> "Sec. 4. No employer ... shall discriminate ... between employees on the basis of sex by paying wages to any employee at a rate less than the rate by which he pays wages to any employee of the opposite sex for work of comparable character on jobs the performance of which requires comparable skills, except where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex." H.R. 8898, 87th Cong., 1st Sess; H.R. 10226, 87th Cong. 2d Sess. (emphasis supplied).

H.R. 8898 and H.R. 10226 were referred to the House Committee on Education and Labor, and the Select Subcommittee on Labor thereof held hearings regarding the bills in March and April 1962.10/ Thirty-nine individuals

10 Hearings on H.R. 8898 and H.R. 10226 before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 87th Cong., 2d Sess. (1962) [hereinafter referred to as "1962 Hearings"].

testified before the subcommittee and statements, letters, etc., were received from many additional parties. In opening the hearings on this subject, Secretary of Labor Arthur Goldberg explained the breadth of this problem as he perceived it and emphasized that the proposed federal pay rate legislation was prompted by the existing situation of widespread deliberate discrimination against women in the setting of wage rates. 1962 Hearings at 11. Secretary Goldberg was followed by Assistant Secretary of Labor Esther Peterson who gave numerous examples of discrimination against women employees working in the same classification as males and also between males and females working in different classifications.11/

Among those who testified in support of H.R. 8898 and H.R. 10226 was James B.

11 1962 Hearings at 32-33. In fact, as part of her testimony, Ms. Peterson pointed to a recent study of the National Office Management Association wherein one-third of the employers had admitted to having dual pay standards for males and females. 1962 Hearings at 65.

Carey, the then President of the IUE, who stated that he believed the bills, as they then existed, were necessary to remedy the following situations of discrimination:

> "(1) Paying lower wages to women on the same jobs as men.
>
> "(2) Changing a man's job by modifying it slightly at a much lower rate of pay for women, a rate change not justified by the modification.
>
> "(3) Paying women lower wages irrespective of the value of the work performed. This occurs in situations where men and women work in different types of jobs in the same plant."12/

The above are examples from the hearings, which are replete with other presenta-

12 1962 Hearings at 173. Mr. Carey then put before Congress allegations of intentional discrimination by various employers (there employers in the electrical industry) who once had dual (male and female) wage structures which, in the IUE's view, had deliberately undervalued jobs performed by women. Mr. Carey contended that those employers' present rate structrues still reflected the vestiges of the former dual structure and, thus, in the IUE's view continued to deliberately undervalue the jobs performed by women. 1962 Hearings at 175-76.

tions by the Administration, advocates of women's causes, and the unions which urged broad federal involvement in the wage area to deal with the alleged problem of deliberate undervaluation of work performed by women.13/

After the wage discrimination bill14/ reached the House, Representa-

13 The standards reflected in the Equal Pay Act were developed against this background of claims of deliberate discrimination against women in the wage area. It would be absurd to contend that Congress believed it was dealing with a problem of inadvertent or unintentional discrimination against women when it adopted the standards of the Equal Pay Act. That is one reason why the suggestion in the opinion denying rehearing, by the court below -- that the presence of an allegation by a plaintiff that the wage discrimination was intentional (when added to a showing of comparable work) somehow makes the situation totally different and permits a court to disregard the equal work requirement -- is not a meaningful distinction. In adopting the equal work limitations of the Equal Pay Act, Congress was reacting to and dealing with a problem of alleged deliberate discrimination.

14 After the subcommittee hearings, H.R. 8898 and H.R. 10226 became H.R. 11677 which was reported out of the House Committee on Education and Labor (cont.)

tive St. George offered an amendment which limited involvement of the federal government to only situations where there was sex discrimination in setting of wage rates "for equal work on jobs, the performance of which requires equal skills." 108 Cong. Rec. 14767. Representative St. George offered the "equal work" amendment to limit wage discrimination claims to the situation where men and women are paid differently for performing the same job.

During debate of the St. George amendment, Mr. Zelenko explained that the "equal work" standard was narrower than his existing bill which allowed federal involvement whenever it was claimed that there was sex discrimination against women performing "comparable work" to that of males, and he urged that the bill

(cont.)
on May 17, 1962. On July 25, 1962, Representative Zelenko offered an amended version of H.R. 11677 to the House as a whole. 108 Cong. Rec. 14765. Section 4 of the bill still retained its provisions prohibiting sex discrimination in the wages of persons performing "work of comparable character on jobs the performance of which requires comparable skills."

retain the "equal pay for comparable work" language, as did the other sponsor of that bill, Representative Green. 108 Cong. Rec. 14768-69.

Representative St. George supported her amendment as follows:

> "What we want to do in this bill is to make it exactly what it says. It is called equal pay for equal work in some of the committee hearings. There is a great difference between the word 'comparable' and the word 'equal.
>
> ". . . The word 'comparable' opens up great vistas. It gives tremendous latitude to whoever is to be arbitrator in these disputes." 108 Cong. Rec. 14767.

Similarly, Representative Landrum noted that the St. George "equal work" amendment would prevent:

> "the trooping around all over the country of employees of the Labor Department harassing business with their various interpretations of the term 'comparable' when 'equal' is capable of the same definition throughout the United States." 108 Cong. Rec. 14768.

The House accepted the St. George amendment[15/] changing the proposed

15 108 Cong. Rec. 14771.

equal pay legislation to provide for equal pay "for equal work on jobs the performance of which requires equal skills."16/ Thus, the House rejected the broad involvement of federal courts in an employer's wage structure that had been urged by the Administration and other supporters of the bill, such as the IUE.

Following other amendments, H.R. 11677 was passed by the House on July 25, 1962, and was subsequently referred to the Senate. The Senate passed its version of equal pay legislation, which also contained the St George amendment limiting the bill to "equal work" situations, but Congress adjourned before a Conference Committee could work out any difference between the two bills.

Early in 1963, in the first session of the 88th Congress, an equal pay bill similar to H.R. 11677, as amended by the St. George amendment, was introduced in the House. This bill was designated H.R.

16 See Section 4 of H.R. 11677 as amended.

3861.[17] Section 4 of H.R. 3861 contained the "equal work" requirement. 1963 Hearings at 3.

The Special Subcommittee on Labor held hearings regarding H.R. 3861 and other equal pay bills throughout March 1963. Twenty individuals testified on the proposed legislation and approximately ninety-five written statements on the legislation were received from various individuals, groups and businesses. Secretary of Labor Wirtz testified on behalf of the Administration and affirmed that the purpose of the equal pay bill was not to increase the wage levels of jobs, but simply to preclude sex discrimination in the setting of wages for equal work. 1963 Hearings at 65.

An equal pay bill was also proposed by Congressman Goodell in the form of an amendment to the Fair Labor Standards Act, 29 U.S.C. §201, et seq. This

17 Hearings on H.R. 3861 and Related Bills before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 88th Cong., 1st Sess. 1 (1963) [hereinafter referred to as "1963 Hearings"].

proposal was designated H.R. 6060 and provided for equal pay for "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions."[18] This was the standard for compensation claims eventually enacted by Congress. 29 U.S.C. §206(d).

The debate on H.R. 6060 is very instructive with respect to Congress' intent to prevent the courts and the government from analyzing and changing wage rates in all but the narrow equal work situation. For example, Representative Frelinghuysen stated in the House:

> "[W]e can expect that the administration of the equal pay concept, while fair and effective, will not be excessive nor excessively wide ranging. What we seek is to insure, where men and women are doing the same job under the same working conditions, that they will receive the same pay. It is not intended that either the Labor Department or individual employees will be equipped with hunting licenses." (emphasis added) 109 Cong. Rec. 9196.

18 See H.R. Rep. No. 309, 88th Cong., 1st Sess. (1963).

Later in the debate, Representative Goodell (the sponsor of H.R. 6060)[19] stated:

> "Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.
>
> "We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing' and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and working conditions, is intended to make this point very clear." 109 Cong. Rec. 9197.

19 Statements made by the sponsors of legislation "deserve to be accorded substantial weight in interpreting the statute." Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976). Accord: Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394 (1951); Gartner v. Soloner, 384 F2d 348, 353 (3d Cir. 1967), cert. denied, 390 U.S. 1040 (1968).

Representative Goodell stated that it was "not intended that the Secretary of Labor or the Courts will substitute their judgment for the judgment of the employers." 109 Cong. Rec. 9209. "It is not the business of the Secretary of Labor to write job evauation systems." Id.

Moreover, Representative Goodell rejected simplistic wage comparisons between men and women as the basis for relief:

> "We do not have in mind the Secretary of Labor's going into an establishment and saying, "Look you are paying the women here $1.75 and the men $2.10. Come on in here, Mr. Employer, and you prove that you are not discriminating on the basis of sex.' That would be just the opposite of what we are doing." 109 Cong. Rec. 9208.

Representative Frelinghuysen shared the sentiments of Representative Goodell:

> "[T]he jobs in dispute must be the same in work content, effort, skill and responsibility requirements, and in working conditions. As indicated earlier, it is not intended to compare unrelated jobs, or jobs that have been historically and normally considered to be different. Violations usually will be apparent, and will almost always occur in the same work area and

where the same tasks are performed." 109 Cong. Rec. 9196.

The legislative history thus indicates that the Courts were not to become involved in attempting to ascertain whether the differences in the duties between jobs were enough to justify the differences in wages between them. If the duties of the jobs were not substantially the same, then the courts were not to be involved in claims of discrimination in wage rates.[20] The House enacted the provisions of H.R. 6060 on May 23, 1963 and, after concurrence by the Senate, it became the Equal Pay Act of 1963.[21]

20 As an example, Representative Griffin noted that under H.R. 6060 the jobs of inspector and assembler could not be compared, nor could inspectors who inspect complicated parts be compared to inspectors making simple, cursory inspections. 109 Cong. Rec. 9197. Representative Thompson, one of the original sponsors of the equal pay legislation, agreed with Mr. Griffin's examples. 109 Cong. Rec. 9198.

21 To avoid the need for a House-Senate Conference Committee, the House vacated passage of H.R. 6060 and incorporated its provisions in their entirety into (cont.)

Thus during 1962 and 1963, Congress carefully considered the issue of sex-based compensation discrimination. The "equal pay for equal work" approach was the result of countless hours of hearings and debate. And throughout the entire consideration of the Equal Pay Act, it is plain that Congress did not want the government or the courts to determine wage rates. As the legislative history shows ". . . one reason for requiring equal work in order to invoke the Equal Pay Act was to preclude any massive job reevaluation by the Government in the Federal Court forum."22/ The equal work requirements, accordingly, have been viewed to be "laudable for that purpose, as the Federal Courts should not

(cont.)
S.1409, a similar bill that had been proposed in the Senate. The House then passed S.1409 and referred it to the Senate. On May 28 1963, the Senate concurred in the House amendment to S.1409. President Kennedy signed the Equal Pay Act on June 10, 1963, but it did not become effective until June 11, 1964.

22 IUE v. Westinghouse Electric Corp., ___ F.Supp. ___, 17 F.E.P. Cases 16, 21 (N.D. W.Va. 1977).

be involved in 'second guessing' economic decisions better left to management and labor."[23] Congress "did not authorize the Secretary or the Court to engage in wholesale reevaluation of an employer's pay structure in order to enforce their own conceptions of economic worth."[24]

We believe that it is extremely unlikely that the same Congress -- which, after eighteen months of hearings and debates, had decided in 1963 upon the extent of federal court involvement it desired in the area of sex-based wage rate claims -- intended to reject all of this work and to abandon the limitations of the equal work approach just one year later, when it enacted Title VII. As we now show, the principles of law concur with the principles of logic in this regard.

23 Id.

24 Brennan v. Prince William Hospital Corp., 503 F.2d 282, 285 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975).

II. BY REASON OF THE PRINCIPLES OF IN PARI MATERIA CONSTRUCTION, THE EQUAL WORK REQUIREMENT WOULD BE APPLICABLE TO SEX-BASED WAGE RATE CLAIMS ASSERTED UNDER TITLE VII, EVEN ABSENT THE LANGUAGE OF THE BENNETT AMENDMENT

The Equal Pay Act and the sex discrimination provisions of Title VII are in pari materia and should be so construed in their interpretation.25/

The court below failed to consider the directly relevant legislative history of the Equal Pay Act, when interpreting Title VII. The legislative intent reflected in the Equal Pay Act, to limit federal court involvement to equal work situations, should be given controlling weight in the interpretation of Title VII, by reason of the principles of in pari materia statutory construction:

> "In terms of legislative intent, it is assumed that whenever the legislature enacts a

25 Numerous federal courts have held that Title VII and the Equal Pay Act are in pari materia. E.g., Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166, 170 (5th Cir. 1975), cert. denied, 423 U.S. 865 (1975); DiSalvo v. Chamber of Commerce, 568 F.2d 593, 596 (8th Cir. 1978); Ammons v. Zia Co., 448 F.2d 117, 119 (10th Cir. 1971).

> provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together." 2A C. Sands, Sutherland Statutory Construction §51.02 (4th ed. 1973) (footnotes omitted).

Although Title VII is more general in terms of the range of subject matters encompassed while the Equal Pay Act deals specifically with sex discrimination in wage rates, it is well-settled that general and specific acts are nonetheless to be construed in pari materia.[26] If there is any conflict, the specific statute will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling. This Court has

26 Radzanower v. Touche Ross & Co., 426 U.S. 148 (1946); United States v. United Continental Tuna Corp., 425 U.S. 164 (1976); Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976).

stated this canon of construction as follows:

> "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' Morton v. Mancari, 417 U.S. 535, 550-551. [footnote omitted] The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general mannr, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.' T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874). [footnote omitted]." Radzanower v. Touche Ross & Co., supra, 426 U.S. 148, 153

(1976).27/

Thus, where, as here, a statute has been drafted dealing with a specific area, the Congressional judgments as to the scope of regulation of that area would not be considered to have been set aside by a later enactment without a clear indication in the later enactment that Congress intended to do so. In United States v. United Continental Tuna Corp., 425 U.S. 164 (1976), the Ninth Circuit had held that an amendment to the Suits in Admiralty Act allowed plaintiffs to sue the United States under that Act and ignore the applicable and more

27 In Radzanower this Court was interpreting a broad general provision in the later act (which authorized suits to be filed against Securities Exchange Act defendants in a variety of jurisdictions). The Court held that the more restrictive specific provisions of an earlier act (the National Bank Act), which had focused more directly on the subject, would control the interpretation of the later more general provisions and suit could be brought against national banks under the Securities Exchange Act only where authorized under the earlier statute.

stringent provisions of the previously enacted Public Vessels Act. This Court rejected that construction of the Suits in Admiralty Act because it amounted to a repeal of the Public Vessels Act by implication without legislative history indicating that Congress intended that result. 425 U.S. at 169. The situation there was similar to the present one. This Court noted that the question was not whether the earlier statute would no longer have application to a particular set of facts, but whether the restrictive provisions thereof could somehow be evaded by bringing suit under another statute. 425 U.S. at 169. The Court recognized that such an evasion of the Congressional purpose reflected in the restrictive provisions would be largely equivalent to repeal of the more restrictive statute and would not be permitted absent some clear statement of intent by Congress that such was intended by the later statute. 425

U.S. at 169.[28]/

28 The court below failed to consider the principle of in pari materia construction in either of its decisions in this case. Interestingly, the Third Circuit, in its Westinghouse decision, acknowledged that the principles of in pari materia construction would suggest that the equal work standard was the applicable standard for sex-based wage rate claims brought under Title VII, citing Radzanower, supra. IUE v. Westinghouse, 23 F.E.P. Cases 588, 593 (3d Cir. 1980). Nevertheless, the Third Circuit decided to "decline to apply this canon," because the Third Circuit believed that the canon should not apply to employment discrimination cases. The Third Circuit mistakenly believed that Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) had so held. However, Alexander did not involve the question of in pari materia construction of statutes. Alexander merely held that a plaintiff's decision to proceed in one forum (arbitration) did not bar him from later proceeding under Title VII. Alexander in no way indicated that the principles of in pari materia construction were inapplicable in ascertaining Congressional intent as to the meaning of the substantive provision of employment discrimination statutes. Of course, even if, assuming arguendo, Alexander had held the principles of in pari materia construction to be generally inapplicable (which it did not), such a holding would obviously not be relevant where, as here, Congress in the later statute specifically referred to the earlier statute (the Equal Pay Act) to assure that they would be construed in the same way.

Similarly, in Train v. Colorado Pub. Int. Research Group, 426 U.S. 1 (1976), this Court rejected a construction of the Federal Water Pollution Control Act which would have substantially altered the regulatory scheme established under the Atomic Energy Act, without a "clear indication of legislative intent." 426 U.S. at 24. Here, of course, the Equal Pay Act was a major piece of legislation in the wage area, and it should be presumed that the equal work standard of the Equal Pay Act continued to be the standard applicable to sex-based wage rate discrimination claims asserted under Title VII absent a clear statement of intent to the contrary in the legislative history of Title VII.

As we discuss infra at 42-78, the legislative history of Title VII does not constitute a clear statement of intent by Congress that it had changed its intention from that reflected in the Equal Pay Act it had passed just one year before. In fact, there is not a single statement in the legislative history of Title

VII which indicates an intention to abandon its decision of the prior year that federal involvement in wage discrimination claims would be limited to situations where men and women were performing equal work.

Actually, the legislative history of Title VII, as discussed infra, indicates that Congress, even prior to the Bennett Amendment, intended the prior, specific Equal Pay Act to be controlling.[29/] This merely buttresses the conclusion that the specific approach to sex-based wage discrimination in the Equal Pay Act would prevail over the general provisions of Title VII even in the absence of the Bennett Amendment.

Of course, although to be in pari materia, statutes need not have been enacted simultaneously or refer to

29 See the discussion of Senator Clark's memorandum infra at 46-49 explaining that Title VII should be construed in harmony with the Equal Pay Act for determining discrimination as to wages.

one another,30/ here the timing of the enactment of the Equal Pay Act and Title VII, along with the specific reference to the Equal Pay Act in the Bennett Amendment in §703(h) of Title VII, lend even further support to the County's position that these two statutes are in pari materia. For example, the Equal Pay Act became effective on June 11, 1964. The Bennett Amendment was inserted into Title VII one day later. In fact, even the composition of the Congress which enacted Title VII was the same as the Congress which enacted the Equal Pay Act.31/ Thus, it is clear that members of Congress, in enacting Title VII, were well aware of their very recent and extensive deliberations regarding the federal solution to alleged sex-based wage discrimina-

30 2A C. Sands, Sutherland Statutory Construction Sec. 51.03 (4th Ed. 1973).

31 The Equal Pay Act was adopted in the First Session of the 88th Congress; Title VII was adopted by the Second Session of the 88th Congress.

tion. As we shall now see, by inserting the Bennett Amendment into §703(h), Congress explicitly sought to ensure that its concept of the limited role of the federal courts in the review of wage rates, that had been developed in the Equal Pay Act, would not be undermined by Title VII. The 88th Congress obviously contemplated a restricted federal involvement in an employer's wage structure limited to assurance of equal pay for equal work, while at the same time assuring that there would be federal protection of equal access by women to any jobs they desired. Lemons v. City & County of Denver, 620 F.2d 228, 230 (10th Cir. 1980), cert. denied, 49 U.S.L.W. 3250 (Oct. 6, 1980). Accordingly, the principles of in pari materia statutory construction fully support the view that the Equal Pay Act's equal work standard applies to sex-based wage rate claims asserted under Title VII.

III. THE LEGISLATIVE HISTORY OF TITLE VII INDICATES THAT CONGRESS INTENDED THAT THE "EQUAL PAY FOR EQUAL WORK" STANDARD WOULD BE APPLICABLE TO WAGE DISCRIMINATION CLAIMS UNDER THAT STATUTE AS WELL

A. The Legislative History Of The Addition Of The Sex Discrimination Provision To Title VII Is Very Brief And Does Not Indicate An Intention To Abandon The Equal Pay Act's Approach To Wage Rate Discrimination.

The bill that was to become the Civil Rights Act of 1964 -- H.R. 7152 -- was proposed on June 20, 1963. That bill did not in any way refer to discrimination with respect to sex, either when proposed or during the several months it was considered by the House Judiciary Committee.32/ As proposed to and considered by the Committee, H.R. 7152 was legislation designed to prohibit employment discrimination only with respect to race, color, religion and national origin. H.R. 7152 was debated in the House from January 31, 1964 to February 10, 1964.

32 See H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

Near the end of the debate, on February 8, 1964, Representative Smith of Virginia offered an amendment to add sex as a protected classification under H.R. 7152. The supporters of H.R. 7152 opposed the hastily introduced amendment, seeing it as a ploy by the opponents of the bill to overburden, weaken and defeat the legislation.[33/] Congresswoman Green, a supporter of H.R. 7152 (and a sponsor of an equal pay proposal in 1962), argued against the Smith amendment because the House Judiciary Committee had never considered -- indeed, had not even been asked to consider -- the advisability of including sex as a protected classification in the proposed legislation. 110 Cong. Rec. 2582. Congressman Celler, the sponsor of H.R. 7152, characterized the Smith amendment as "illogical, ill timed, ill placed and improper." 110 Cong. Rec. 2578.

The Smith amendment was accepted by the House on the same afternoon it was

33 See the remarks of Congresswoman Green at 110 Cong. Rec. 2581. Representative Smith, who proposed the amendment, voted against Title VII (H.R. 7152). 110 Cong. Rec. 15365.

proposed, without any hearings or committee deliberations, and with hardly any debate. Thus, at the time of adoption of the Smith "sex" amendment, the intent of Congress as to its general meaning and scope is unclear.34/ The legislative history of the Smith amendment is "notable primarily for its brevity." General Electric Co. v. Gilbert, 429 U.S. 125, 143 (1976). However, it is clear that there were no discussions in hearings, committee reports, or floor debates prior to the

34 The Fifth Circuit Court of Appeals en banc in Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, 1090 (5th Cir. 1975) decided that the legislative history of Title VII's sex discrimination provisions was so "inconclusive" that it could be inferred that Congress did not intend the provisions to have "sweeping implications". Willingham held that the scanty legislative history of the Smith Amendment did not warrant the extension of the Title VII sex discrimination provisions to "situations of questionable application". Id. Obviously, involvement of the federal courts in wage rate claims in other than equal work situations is, at best, a "situation of questionable application" in light of Congress' rejection of such an approach in the Equal Pay Act the prior year.

Smith amendment which would have provided the basis for reconsideration by the Congress of its decision to adopt the equal work standard.

Moreover, while the reason the House added sex as a protected classificaton to H.R. 7152 is ambiguous (if not suspect), the subsequent legislative history of H.R. 7152 after it was passed by the House and referred to the Senate is clear with respect to the intended scope of the sex provisions in the compensation area. In the compensation area, the Senate paid "especial attention to the provisions of the Equal Pay Act." General Electric, supra, 429 U.S. at 143. As discussed below, the Senate determined that the Equal Pay Act standard would remain applicable under H.R. 7152 and the House later concurred.

H.R. 7152 went directly to the Senate Floor for debate upon its referral from the House. After three weeks of debate, Senator Clark, one of the floor managers for the bill, took the floor in support of passage of that bill. 110 Cong. Rec. 7208. Senator Clark had prepared various documents in response to objections to the bill which he believed to be un-

founded. The Senator submitted, inter alia, opinions from prominent lawyers, the Justice Department and the Labor Department stating that Title VII was constitutional, in reply to contrary contentions. He also presented a memorandum that responded to certain objections which had been raised in the form of questions by Senator Dirksen in a prior speech on the Senate floor, which questions Senator Clark felt his memorandum "answered rather convincingly." 100 Cong. Rec. 7215. Next, Senator Clark read into the record another memorandum he had prepared that answered certain other objectios which he noted had been raised both on and off the Senate floor and which he had selected for response. 110 Cong. Rec. 7217. One of these unfounded objections, selected for rebuttal in Senator Clark's memorandum, dealt with the compensation area. In response thereto Senator Clark clearly stated that Congress intended to continue the equal work standard under the Civil Rights bill:

> "Objection. The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963.

> But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitation in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.
>
> Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike Title VII. Furthermore, under Title VII, jobs can no longer be classified as to sex, except were there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII." 110 Cong. Rec. 7217 (1964) (emphasis added).

Senator Clark was explaining that the sponsors of Title VII construed the legislation in pari materia with the Equal Pay Act concerning wage discrimination claims. His comment was motivated by what he considered to be an unfounded objection. That objection was twofold: (1) that the sex discrimination provisions of Title VII were unnecessary since they duplicated the Equal Pay Act and (2) that, moreover, the sex discrimination

provisions of Title VII were improper since the equal work limitation was not specifically included in the language of Title VII and thus wage rate claims might be made concerning men and women "across different jobs." In response to that objection Senator Clark initially pointed out that the sex discrimination provisions of Title VII were necessary, notwithstanding the Equal Pay Act, because (a) the Equal Pay Act had numerous exemptions for various types of businesses and (b) Title VII covered discrimination in access (e.g., assignment and promotion) to jobs -- not just compensation. Finally, Senator Clark made clear that in the compensation area the equal work standard would continue to be the applicable standard.35/ Thus,

35 Senator Clark's position that the equal work standard would be deemed incorporated even absent specific language to that effect is in accord with well accepted principles of in pari materia statutory construction. See the discussion, supra, at 32-41. Senator Clark's explanation is entitled to great weight in view of his role as manager in charge of Title VII on the Senate Floor. Wright v. Vinton Branch of the (cont.)

Senator Clark rejected the unfounded objection that the sex provisions of Title VII were either unnecessary on one hand, or extended beyond the equal work standard on the other.

The court below, in denying rehearing, erroneously concluded that since the last sentence in the above quotation referred to the "comparable situation" Senator Clark must have meant that the Equal Pay Act standards are applicable only when a sex based wage discrimination claim is based on a theory that the plaintiffs were denied equal pay for equal work. (Pet App. 7a-8a). Not only is there no support for this interpretation, but this interpretation is totally implausible. The unfounded objection which Senator Clark had selected for rebuttal was that sex-based wage rate claims under Title VII might go beyond the equal work standard. Under the Ninth Circuit's interpretation, Senator Clark

(cont.)
Mountain Trust Bank, 300 U.S. 440, 463-64 and n. 8 (1937); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 475 (1921); Ideal Farms, Inc. v. Benson, 288 F.2d 608, 616 (3d Cir. 1961), cert. denied, 372 U.S. 965 (1963).

was agreeing that Title VII wage rate claims could go beyond the equal work standard, i.e., whenever the plaintiffs alleged some other theory. Under the Ninth Circuit's interpretation Senator Clark was agreeing with the unfounded objection he had selected for rebuttal. That interpreation would be nonsensical. The logical reading of Senator Clark's statment reveals that the "comparable situation" to which he referred was wage discrimination generally as opposed to claims involving some other alleged employment practice, such as hiring or promotions. Senator Clark had made reference in the preceding sentence to such another type of unlawful practice, i.e., job segregation based on sex. In the last sentence he singled out "discrimination as to wages" and indicated that the standards of the Equal Pay Act would be applicable there. There is nothing in the passage to support the Ninth Circuit's conclusion that certain kinds of wage discrimination claims would be governed by standards other than the Equal Pay Act.36/

36 The Third Circuit majority opinion (cont.)

(cont.)
drew a somewhat different, but equally unlikely, conclusion i.e., that Senator Clark's memorandum was "not helpful as a gude to interpret the Bennett Amendment" since it predated the Bennett Amendment by two months. IUE v. Westinghouse, supra, 23 F.E.P. Cases at 594. This is obviously erroneous for a number of reasons. First, the Clark memorandum is relevant under principles of in pari materia construction to show the intention of Congress to preserve (rather than discard) the carefully adoped equal work standard, even absent the language of the Bennett Amendment. Second, because it shows the intentions of the Senate floor leadership on this matter even from the early part of the Senate debate, it provides a good context for understanding the later acceptance of the Bennett Amendment. The Third Circuit majority opinion is internally inconsistent on this matter. When discussing the Clark memorandum, it states that it is not helpful because it preceded the Bennett Amendment. But when discussing the Bennett Amendment, that court suggests that it should not be interpreted as limiting the scope of Title VII's wage discrimination provisions, as urged by the employer there, because it "would have been more widely disputed and discussed if that was the intent." 23 F.E.P. Cases at 596. But, the Bennett Amendment was not widely disputed because it implemented what had been the intention of Congress all along. Not only does the prior legislative history of the Equal Pay Act so demonstrate, but Senator Clark's memorandum does also.

Notwithstanding Senator Clark's earlier explanation, Senator Bennett remained concerned that, absent an explicit cross-reference to the Equal Pay Act, the "wholesale insertion" of the word "sex" in H.R. 7152 could nullify the carefully conceived Equal Pay Act standard. 110 Cong. Rec. 13647. Accordingly, he offered the following amendment to H.R. 7152:

> "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

Senator Bennett's amendment was designated a "technical correction" by the Senate leadership obviously since (1) the amendment confirmed the general intention of the Senate as evidenced by Senator Clark's earlier explanation of Title VII, and (2) the time for debate had been limited by the invocation of

cloture.[37] Senator Bennett's amendment was promptly agreed to by the Senate.

According to its terms, the Bennett Amendment clearly incorporates the "equal pay for equal work" standard of the Equal Pay Act into Title VII. Moreover, when the legislative history and purpose of the Bennett Amendment are considered, there is no doubt that it incorporates the Equal Pay Act's "equal work" standard into Title VII.[38]

In the limited time available when offering his amendment, Senator Bennett explained the purpose behind his amendment as follows:

> "Mr. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after careful study by

37 Senator Bennett's statements, discussed in greater detail infra, confirm both of these points. 110 Cong. Rec. 13647 and 111 Cong. Rec. 13359.

38 The intent of Congress properly can be discerned by looking to legislative histories of the statutory provisions in question. E.g., Train v. Colorado Pub. Int. Research Group, Inc., 426 U.S. 1 (1976); United States v. American Trucking Associations, 310 U.S. 534 (1940); Cass v. United States, 417 U.S. 72 (1974).

> the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.
>
> "By this time, programs have been established for the effective administration of this act. Now when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.
>
> "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." (emphasis added) 110 Cong. Rec. 13647 (1964).

This passage clearly and concisely reflect the very principles of in pari materia statutory construction which are reflected in prior decisions of this Court and which have been discussed supra at 32 to 41. This passage demonstrates that the Bennett Amendment was intended to assure that the standards which had resulted from the "careful study" that produced the Equal Pay Act would continue under Title VII as the standards intended by Congress for treatment of sex-based wage discrimination claims. The key

standard reflected in the Equal Pay Act and the key decision reached by Congress in its "careful study", which produced the Equal Pay Act, was the equal work requirement.39/

39 The Third Circuit majority erroneously suggested (23 F.E.P. Cases at 595) that because the Senate had rejected certain other amendments which would have limited Title VII, the Senate would not have accpeted the Bennett Amendment if the purpose of that Amendment had been to limit Title VII sex-based wage claims in any way. There are several reasons why that suggestion is incorrect. First, during the same period in which the Bennett Amendment was considered and adopted by the Senate, various amendments which did significantly limit the scope or applicability of Title VII were introduced and adopted. Specifically, the Mansfield-Dirksen substitute amendment to H.R. 7152, introduced on June 10, 1964, added the first sentence to §703(h), containing explicit exceptions for employment practices based on a bona fide seniority or merit system, or on a system which measures earnings by quantity or quality of production. See 110 Cong. Rec. 13310 (1964). This first sentence of §703(h) has been established to have been a significant limitation upon the reach of Title VII. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The Mansfield-Dirksen amendment, inter alia, (cont.)

(cont.)
also broadened the bona fide occupational qualification exception contained in §703(e); eliminated the EEOC's power to initiate an action in federal court; changed §706 to include stringent procedural prerequisites which must be satisfied before an aggrieved individual may bring suit in federal court; and added §703(j), which relieved an employer from the obligation of meeting any racial quota in the workforce. Also, on June 13, 1964, the Senate adopted the Tower Amendment (No. 952) to §703(h), which permits an employer to base personnel decisions on the results of ability tests. See 110 Cong. Rec. 13724 (1964). These other amendments, not considered by the Third Circuit majority opinion, demonstrate that at the time the Bennett Amendment was adopted, the Senate was making significant changes in the scope of Title VII, and that an interpretation of the Bennett Amendement as incorporating the "equal pay for equal work" standard into Title VII is entirely consistent with the other amendments adopted by the Senate at that time. Secondly, the Third Circuit ignored the fact that the Bennett Amendment did not reduce the scope of Title VII which had been intended by Congress. The Bennett Amendment merely reflected the desires of Congress from the start of the debate, as reflected in the Clark memorandum discussed supra, that the equal work standard be a prerequisite to sex-based wage rate claims.

In view of Senator Bennett's statment that "[t]he purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified," it must be recognized that the principal way that the Equal Pay Act can be nullified would be to allow plaintiffs unable to meet the "equal pay for equal work" standard to proceed under Title VII asserting some other theory of wage discrimination. Such a result would, for all practical purposes, constitute a repeal of the equal work standard of the Equal Pay Act by implication and would be directly contrary to prior decisions of this Court. E.g., Radzanower v. Touche Ross & Co., supra; United Continental Tuna Corp., supra; and Train v. Colorado Pub. Int. Research Group, Inc., supra. Congress' concern that the government and courts not become generally involved in the wage area would be cast aside.

After Senator Bennett's explanation of his Amendment, he asked the Senate leadership to indicate their acceptance of the amendment so that it could be voted on as a proper "technical correction", i.e., an amendment which would not

change the intention of the bill. Senator Humphrey succinctly agreed. Senator Dirksen took the occasion to give a short speech. It was on the basis of Senator Dirksen's short speech that both the Ninth Circuit and the Third Circuit concluded that in enacting Title VII Congress must have intended to go beyond the Equal Pay Act's standards. The following (110 Cong. Rec. 13647) is that dialogue:

> "Mr. BENNETT. I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand [sic], I shall ask that the amendment be voted on without asking for the yeas and nays.
>
> "Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.
>
> "Mr. DIRKSEN. Mr. President, I yield myself 1 minute.
>
> We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor standards Act. The Fair Labor Standards Act carries out certain exceptions.

> All that the pending amendment does is recognize those exceptions, that are carried in the basic act.
>
> Therefore, this amendment is necessary, in the interest of clarification.
>
> "The PRESIDING OFFICER. (Mr. RIBICOFF in the chair). The question is on agreeing to the amendment of the Senator from Utah. (Putting the question.)
>
> The amendment was agreed to."

The reasoning of the Ninth Circuit and the Third Circuit regarding this dialogue is very curious. Those courts concluded that -- because Senator Dirksen referred to how the Fair Labor Standards Act carried out certain exceptions and that the Bennett Amendment preserved those exceptions -- Senator Dirksen must have viewed the Bennett Amendment as not intending to preserve the basic core "equal work" standard of the Equal Pay Act, but only the exceptions of the Fair Labor Standards Act. The Ninth and Third Circuits viewed the word "exceptions" as referring to the affirmative defenses in the Equal Pay Act. Pet. App. 35a; 23 F.E.P. Cases at 595. However, Senator Dirksen's use of the word "exceptions"

came after his reference to the entire Fair Labor Standards Act, not merely the Equal Pay Act. This statement of Senator Dirksen is not as clear as his 1965 statements discussed infra at 62-63. The 1964 statement may well have been a reference to the exceptions then carried in the basic Fair Labor Standards Act for numerous types of enterprises (e.g., hospitals, nursing homes, schools, the fishing industry, etc.) and certain types of employees (e.g., executive, administrative, professional employees, etc.). Of course, the refusal of Congress in the Equal Pay Act to cover situations other than where "equal work" was involved might also have been considered as an exception by Senator Dirksen. But, the Ninth and Third Circuits incorrectly concluded that this unclear statement by Senator Dirksen must have been referring to the affirmative defenses in the Equal Pay Act even though he never used the phrase "affirmative defenses" and he referred to the "basic act" which is the Fair Labor Standards Act. Most likely Senator Dirksen presumed that there was not any dispute about the incorporation of the equal work standard as a require-

ment for assertion of sex discrimination claims under Title VII and he was focusing upon the Fair Labor Standards Act exceptions. It is unlikely that he would have been interested in preserving either the exceptions or the affirmative defenses but not the basic standard, i.e., the equal work standard. Of course, Senator Dirksen may even have been off on a tangent in his 1964 statement. But, in any event, that statement should not be given the "special significance" accorded by the Third Circuit. Moreover, it should be noted that Senator Humphrey had simply and directly indicated his concurrence with Senator Bennett's explanation.

Senator Bennett took further steps to ensure that the purpose of his amendment would be clearly understood when in 1965 he offered an amendment to the Senate's cloture rule to allow an additional five minutes for Senators to explain legislative amendments after the invocation of cloture. 111 Cong. Rec. 13359. Senator Bennett believed that additional time would be helpful for purposes of legislative history and he noted that after cloture had been invoked during the

debate of Title VII, the Senate leadership had urged him not to fully explain the Bennett Amendment since (1) the leadership understood and agreed with his intent to incorporate the Equal Pay Act standard into Title VII and (2) only a limited amount of time was available to complete work on Title VII. Id. Senator Bennett stated that even though it was well understood by the Senate that the Bennett Amendment was intended to mean "discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act," the restrictions of cloture had limited the Senator's ability to fully explain that intent. Id. Senator Dirksen, who was present in 1965 when Senator Bennett offered his amendment to the cloture rule, agreed with the comments of Senator Bennett. 111 Cong. Rec. 13360. Senator Dirksen stated that he and Senator Humphrey (another floor leader for the Civil Rights Act) and their staffs were in accord with Senator Bennett's understanding of the Bennett Amendment and that the Senator had accepted it on that basis. With respect to Senator Bennett's 1965 explanation of

the Bennett Amendment, Senator Dirksen further stated: "I trust that that will suffice to clear up in the minds of anyone, whether in the Department of Justice or elsewhere, what the Senate intended when that amendment was accepted."40/

The fact that Congress intended the test for determining wage discrimination under the Equal Pay Act to be the same for Title VII is further emphasized by the House of Representatives' understanding of the Bennett Amendment when that body agreed to that Amendment. After the Senate had amended H.R. 7152 and then

40 With respect to the 1965 statements by Senators Bennett and Dirksen, the supplemental opinion of the court below acknowledges that Senator Bennett's intention was to incorporate the Equal Pay Act's "equal work" standard into Title VII. But the Ninth Circuit (whose original opinion had lamented the sparseness of indications of Congressional intent) in rejecting rehearing held that Senator Bennett's statements of intent in 1965 were not binding on it because they were not made contemporaneously with the enactment of Title VII. (Pet. App. 4a-5a). The Ninth Circuit's basis for disregarding Senator Bennett's statements is unpersuasive. This Court's decision in Galvan v. Press, 347 U.S. 522 (1954) cited by the (cont.)

(cont.)
Ninth Circuit, actually supports the view that Senator Bennett's statements are entitled to great weight since he sponsored the Amendment. In Galvan, this Court relied upon a 1951 memorandum by Senator McCarran in interpreting the meaning of a 1950 statute he sponsored. 347 U.S. at 526-27. The Ninth Circuit's earlier opinion, Manhart v. City of Los Angeles Department of Power and Water, 553 F.2d 581 (9th Cir. 1976), aff'd in part and rev'd in part on other grounds, 435 U.S. 702 (1978), which had found unpersuasive certain comments regarding the Bennett Amendment made by Senator Humphrey after the Amendment's passage, carries little precedential value on this point since the Supreme Court in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), analyzed those same comments without suggesting any infirmity because they were made after passage. The Ninth Circuit's opinion admits that this Court's decision in the Manhart case did not address the question of whether the Equal Pay Act's "equal work" standard applied to Title VII wage claims. (Pet. App. 12a). In addition to incorrectly interpreting Galvan, the Ninth Circuit failed to consider other authority of this Court which accords weight to non-contemporaneous legislative statements. E.g., Sioux Tribe v. United States, 316 U.S. 317, 329-30 (1942); Haynes v. United States, 390 U.S. 85 (1968). Finally, it should be noted that Senator Bennett's 1965 statement was made shortly after Title VII was enacted and would have been made contemporaneously with the enactment of the Bennett Amendment but for the invocation of cloture.

passed the amended bill that bill was returned to the House for deliberation on the Senate amendments. Congressman Celler, the original sponsor of H.R. 7152, provided the official and only explanation of the Bennett Amendment to the House membership prior to acceptance of the Senate amendments. He stated that the Bennett Amendment:

> "Provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex -- section 703(b) [sic] [703(h)]". (emphasis added) 110 Cong. Rec. 15896 (1964).

Congressman Celler's explanation clearly means that compliance with the Equal Pay Act[41/] satisfies the requirements of Title VII in the wage area. This explanation of the Bennett Amendment is entitled to great weight because (1) it was made by the sponsor of the legislation who obviously understood its provisions, including its amendments, and (2) the House passed H.R. 7152, including

41 The Equal Pay Act is contained in the Fair Labor Standards Act. 29 U.S.C. §206(d).

the Bennett Amendment, based on Congressman Celler's explanation.42/ After Congressman Celler's explanation of its provisions, the Civil Rights Act of 1964 was enacted by the House and, thus, became law.

The point that emerges from the legislative history of the Bennett Amendment is that while Title VII probably would have been construed in pari materia with the Equal Pay Act even

42 United States v. United Mine Workers, 330 U.S. 258, 279-80 (1947); Federal Energy Admin. v. Algonquin SNG, Inc., supra; Schwegmann Bros., supra. The Ninth Circuit incorrectly refused to give weight to Congressman Celler's comment, because that court believed that the comments of Senator Clark and Senator Bennett, discussed supra, were to the "contrary or inconclusive." First of all, the comments of Senators Clark and Bennett certainly are not contrary to those of Congressman Celler. Moreover, we do not believe that they are inconclusive either, for the reasons set forth supra. But, even if the comments of Senators Clark and Bennett were inconclusive, that would be no basis to disregard Congressman Celler's comment. The Third Circuit had a different theory for disregarding Congressman Celler's statement. The Third Circuit found that Congressman Celler's statement must have been (cont.)

without the Bennett Amendment,[43] the

(cont.)
implicitly referring only to situations where a plaintiff was alleging that different pay for equal work had occurred. IUE v. Westinghouse, 23 F.E.P. Cases at 595. The Third Circuit made this interpretation of the above quotation as follows. First, the Third Circuit correctly assumed that Congressman Celler obviously was not referring to satisfaction of all of the requirements of Title VII "since Title VII proscribes a broad range of gender-based discrimination which is not barred by the Equal Pay Act, such as discriminatory promotions, transfers and firing." Id. From this, the Third Circuit, without any substantiation, asserted that Congressman Celler must have been saying that compliance with the equal work standard constitutes compliance with Title VII only when a plaintiff is alleging a violation of the equal work standard. There is no warrant for that interpretation of Congressman Celler's statement. The very language of the Bennett Amendment applies to discrimination in "wages or compensation". There was no reason for Congressman Celler to repeat that phrase in his explanation since anyone reading the Bennett Amendment knew it applied to discrimination in "wages or compensation" not "promotions, transfers and firing". Congressman Celler's explanation obviously meant that compliance with the Bennett Amendment satisfied Title VII's sex discrimination provisions in the wage and compensation area.

43 See, the cases discussed supra at 32-41 and Senator Clark's memorandum quoted and discussed supra at 46-49.

Bennett Amendment was intended to make sure that the "equal pay for equal work" standard would continue to be the only standard for wage discrimination claims under Title VII.

B. The Language Of Section 703(h) Also Indicates That The Equal Pay Act's Equal Work Standard, Not Merely The Affirmative Defenses, Were Intended To Be Incorporated By The Bennett Amendment.

In its original decision, the court below did not have before it and did not consider much of the legislative history discussed supra.44/ Moreover, in its original decision, the Ninth Circuit had not placed much reliance upon the particular language of the Bennett Amendment, itself. In that original opinion the Ninth Circuit stated:

> "Two interpretations of the Bennett Amendment are plausible. The Bennett Amendment can be interpreted to incorporate the Equal Pay Act's equal work formula into Title VII. Under

44 The principal contention of the Plaintiffs in the court of appeals was that the district court had erred in finding that they had not met the equal work standard.

> this construction Title VII and the Equal Pay Act would be coextensive in the area of sexually discriminatory compensation and a plaintiff could prove a violation of Title VII only if discriminatory compensation also violated the Equal Pay Act. Alternatively, the Bennett Amendment can be construed as simply incorporating the Equal Pay Act's four affirmative defenses, but not its equal work standard, into Title VII's prohibition. We find the latter interpretation more persuasive." (Pet. App. 33a)

The Ninth Circut then noted that the legislative history was "sparse" but relied upon the statement by Senator Dirksen, discussed supra at 58 to 61, as the basis for holding the "latter interpretation more persuasive." (Pet. App. 33a). After the above legislative history regarding Senators Clark and Bennett and Congressman Celler was presented to the court by Petitioner and amicus Equal Employment Advisory Council, in conjunction with the petition for rehearing, the Ninth Circuit placed much less reliance upon legislative history as a basis for its decision. However, the court below, instead, placed great emphasis upon a revised view of the

meaning of the language of the Bennett Amendment. In the opinion denying rehearing, the Ninth Circuit stated that the language of the Bennett Amendment "almost compels the interpretation that the Bennett Amendment merely incorporates only the Equal Pay Act's defenses into Title VII." (Pet. App. 9a).

We submit that the language of the Bennett Amendment certainly does not "compel" the conclusion that it referred only to the Equal Pay Act's affirmative defenses. The Bennett Amendment explicitly refers to the entire Equal Pay Act (Section 6(d) of the Fair Labor Standards Act). There is no reference in the language of the Bennett Amendment to the affirmative defenses. This is, of course, consistent with Senator Bennett's stated concern that the "careful study" which resulted in the Equal Pay Act not be discarded. There was no suggestion by Senator Bennett that he was concerned only with preservation of the careful study which went into the Equal Pay Act's affirmative defenses, but not the basic core provision of the Act. When concern had previously been expressed regarding preservation of the standards of the

Equal Pay Act, that concern was expressed in regard to the equal work standard, not the affirmative defenses.45/

The Ninth Circuit, however, believed that the use of the word "authorized" was somehow a cryptic reference to only the affirmative defenses in the Equal Pay Act. That court believed that by using the word "authorized" Congress was drawing a fine distinction between something that was not illegal because it was not prohibited by the core equal work provision of the Equal Pay Act and something that was not illegal because it was within the affirmative defenses. The Third Circuit adopted a similar position when it stated that it viewed the word "authorized" as being "used to describe something that is endorsed or expressly permitted and not ... something which is merely not prohibited." IUE v. Westinghouse, supra, 23 F.E.P. Cases at 593. In support of this position the Third Circuit cited a definition of the word "authorized" in Webster's Third New International Dictionary. There are a

45 See the objection and response set forth in Senator Clark's memorandum, supra at 46-47.

number of reasons why the approach of the Third and Ninth Circuits was in error. First, neither court considered the facts, as noted supra, that (a) the Amendment explicitly referred to the entire Equal Pay Act, not merely the affirmative defenses, (b) Senator Bennett's comments did not suggest his concern was in any way limited to the affirmative defenses -- or even included the affirmative defenses, and (c) the concern expressed in Congress even before the Bennett Amendment was enacted in preserving the equal work standard, not the affirmative defenses. In interpreting the Bennett Amendment, we believe that the courts should attempt to implement that legislative intent rather than focusing upon dictionary definitions of the word "authorized."46/ However, even if dictionary definitions were to be our guide, the word "authorized" has been defined to mean exactly what the Ninth

46 Learned Hand suggested that in construing a clause in a statute one should not "make a fortress out of the dictionary," but rather should attempt to implement the legislative purpose. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), aff'd, 326 U.S. 404 (1945).

and Third Circuits said it could not. Black's Law Dictionary (4th ed 1968) at 169 defines "authorized" to mean "to permit a thing to be done in the future."47/

Moreover, when the sequence of the offering and passage of the Bennett Amendment are considered, it becomes even more certain that the Amendment was not aimed at preserving only the affirmative defenses of the Equal Pay Act and that the Ninth and Third Circuit's focus upon debatable dictionary definitions of the word "authorized" do not well serve Congressional intent.48/

At the time Senator Bennett offered his amendment, the first sentence of §703(h) already provided that it was not an unlawful employment practice under Title VII to pay a wage differential:

47 See the discussion of this point by Judge Van Dusen in IUE v. Westinghouse, supra, 23 F.E.P. Cases at 601.

48 The four affirmative defenses of the Equal Pay Act cover payments "made pursuant to (i) a seniority system (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . ." 29 U.S.C. §206(d).

> ". . . pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."

Thus, three of the four Equal Pay Act affirmative defenses, i.e., a "seniority system," a "merit system," and a "system which measures earnings by quantity or quality of production" had already been specified in the first sentence of §703(h). The fourth Equal Pay Act affirmative defense, i.e., a payment based on "any other factor other than sex" hardly needed to be added to Title VII since Title VII would not apply to sex situations in the first place unless the employer was discriminationg "becuase of ... sex."49/ Thus, if the Ninth Circuit's interpretation of the Bennett Amendment were correct, the Bennett Amendment would be construed as making no addition to the meaning of Title VII. The last sentence of §703(h) would be

49 The Ninth Circuit had been unaware, at the time of its original decision, (cont.)

meaningless.

However, "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . .(citation omitted)" 2A C. Sands, Sutherland Statutory Construc-

(cont.)
that the language of Title VII already contained all of the affirmative defenses before the Bennett Amendment was added. That court, in denying rehearing, contended that even if the three other affirmative defenses had been noted in the first sentence of Section 703(h), the Bennett Amendment was most significantly intended to incorporate the "any other factor other than sex" defense of the Equal Pay Act. (Pet. App. 11a) This suggestion is demonstrably illogical on the face of the Bennett Amendment, itself, without even reference to the language of §703(a). If the Ninth Circuit's view were reflected in the statutory language, the Bennett Amendment would then be interpreted to read as follows: It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation ... if such differentiation is based on any other factor other than sex. That interpretation would make nonsense out of the Bennett Amendment.

tion §46.06 (4th ed. 1973).50/ The Ninth Circuit's interpretation of the Bennett Amendment, which essentially renders it superfluous and insignificant, flies in the face of this fundamental rule of statutory construction.

This Court, however, has previously recognized that the Bennett Amendment did have meaning and significance. This Court explained that it was the intent of Congress, as reflected in the Bennett Amendment, to preserve and incorporate the equal pay for equal work standard -- not merely the affirmative defenses -- of the Equal Pay Act.

In General Electric Co. v. Gilbert, 429 U.S. 125, 144 (1976), this Court held

50 This basic principle that the courts are to construe a statute so as to give effect, if possible, to every clause and every word thereof is reflected in even the early cases. Montclair v. Ramsdell, 107 U.S. 147, 152 (1883). That principle continues to be applicable. See F.A.A. v. Robertson, 422 U.S. 255, 261 (1975) (it is "axiomatic that all parts of an Act 'if at all possible, are to be given effect,'"); Weinberger v. Hynson, Wescott & Dunning, Inc., 412 U.S. 609, 633 (1973); Mercantile National Bank v. Langdeau, 371 U.S. 555, 560 (1963); United States v. Menasche, 348 U.S. 528, 538-39 (1955).

that the Bennett Amendment made interpretations of the Equal Pay Act's core "equal pay for equal work" provision applicable to Title VII. The plaintiffs there were urging that the exclusion of maternity from benefit plans was sexually discriminatory under Title VII. In rejecting those arguments, the Court stated:

> "The legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity. Even so, however, Congress paid especial attention to the provisions of the Equal Pay Act, 29 U.S.C. §206(d) [at which point this Court quoted in a footnote that entire act, including the equal work standard, not merely the affirmative defenses], when it amended §703(h) of Title VII by adding [the Bennett Amendment]." 429 U.S. at 143.

The Court then stated that: "Because of this [Bennett] amendment, interpretations of §6(d) of the Equal Pay Act are applicable to Title VII as well ..." 429 U.S. at 144. At that point the Court quoted and relied upon an interpretation of the core "equal pay for equal work" provision of the Equal Pay Act, not one

of the affirmative defenses.51/

In summary regarding the legislative history of Title VII, the Ninth Circuit's interpretation of the Bennett Amendment not only would render the last sentence of §703(h) meaningless, but would also be inconsistent with clear Congressional intent to preserve the approach taken, after "careful study", in the Equal Pay Act.

51 The Ninth Circuit essentially ignored this portion of the General Electric opinion. The Third Circuit's only response was an erroneous synopsis of that case. The Third Circuit stated: "With the Bennett Amendment the Equal Pay Act exceptions became 'applicable to Title VII as well.' General Electric v. Gilbert, 429 U.S. at 144 (Equal Pay Act provisions on pregnancy benefits are controlling)." 23 F.E.P. Cases at 593. As the complete quotation from General Electric set forth above makes clear, the Court did not refer only to "exceptions" or to "affirmative defenses." It referred to the entire Equal Pay Act and relied upon a regulation interpreting the "equal pay for equal work" standard. 29 C.F.R. §800.116(d) (1975).

IV. THE EEOC'S CONTEMPORANEOUS INTERPRETATION OF THE BENNETT AMENDMENT REFLECTS THE CONGRESSIONAL INTENT TO INCORPORATE THE EQUAL WORK STANDARD INTO TITLE VII AS THE STANDARD OF PROOF APPLICABLE TO SEX-BASED COMPENSATION DISCRIMINATION CLAIMS UNDER TITLE VII

Further support for Petitioner's position is found in the EEOC's official interpretations of the Bennett Amendment which were issued shortly after the passage of the statute in the form of an official regulation as well as official opinion letters. These contemporaneous agency interpretations are entitled to considerable weight as they were issued by the administrators of the statute when the intent of Congress was fresh in their minds. Udall v. Tallman, 380 U.S. 1, 16 (1965); General Electric Co. v. Gilbert, supra, 429 U.S. at 142. The EEOC's contemporaneous interpretations of the Bennett Amendment clearly state that the Equal Pay Act's equal work standard is incorporated into title VII as the standard which must be met by plaintiffs alleging sex-based compensation discrimination claims under Title VII. Their interpretations clearly reject the position taken by the Ninth Circuit that

the use of the word "authorized" in the Bennett Amendment was intended to incorporate the Equal Pay Act's affirmative defenses, but not the equal work requirement. To the extent that the EEOC's current position concerning the Bennett Amendment conflicts with these more contemporaneous interpretations, the earlier interpretations should be accorded the greater deference by this Court. Udall v. Tallman, supra; General Electric, supra.

Shortly after Title VII was enacted, the EEOC issued official "Guidelines on Discrimination Because of Sex," which initially appeared in 30 Federal Register 14927 (Dec. 2, 1965). One of the official 1965 guidelines specifically interpreted the Bennett Amendment as follows:

> "(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. §206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in

> the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act." (emphasis supplied).52/

Shortly after the EEOC issued its guideline interpreting the Bennett Amendment, the Commission's General Counsel explained the guideline in an official opinion letter. EEOC General Counsel Duncan opined on December 29, 1965 (the same month that 29 C.F.R. §1604.7 was promulgated) as follows:

> "The Commission, as indicated in section 1604.7 of the Guidelines issued November 24, 1965, 30 F.R. 14928, has decided that Section 703(h), Title VII of the Civil Rights Act of 1964 incorporates the definition of discrimination in compensation found in the Equal Pay Act, including the four enumerated exceptions, but that

52 This interpretation was codified as 29 C.F.R. §1604.7 (1966).

> Section 703(h) was not intended to recognize for purposes of Title VII the various exemptions to the coverage of the Fair Labor Standards Act found elsewhere in that statute. Therefore, where a charge of discrimination in compensation on grounds of sex involves an employee covered by both the Fair Labor Standards Act and Title VII, the Wage-Hour Administrator and this Commission have concurrent jurisdiction, but where the employee is exempted from the Fair Labor Standards Act but covered by Title VII, this Commission is the appropriate enforcement agency." App. B.

EEOC General Counsel Duncan's opinion as to the EEOC's official interpretation of the Bennett Amendment leaves no room for doubt; he quite clearly stated that the Bennett Amendment had incorporated "the definition of discrimination in compensation found in the Equal Pay Act", i.e., the equal work standard, as well as the "four enumerated exceptions," i.e., the Equal Pay Act's four affirmative defenses. The EEOC General Counsel also made clear that the third sentence of 29 C.F.R. §1604.7(a) was merely intended to clarify the employee coverage provision of Title VII.53/

53. General Counsel Duncan's official (cont.)

(cont.)
explanation of the 1965 guideline shows the error in the interpretations of the guideline by the Ninth Circuit below and the Third Circuit panel majority in IUE v. Westinghouse, supra. In the instant case the Ninth Circuit, referring only to the first sentence of §1604.7(a), erroneously contended that the EEOC's 1965 guideline caused the equal work standard to apply under Title VII only when a Title VII plaintiff was asserting an equal pay for equal work claim. (Pet. App. 38a). However, §1604.7(a), as well as General Counsel Duncan's official explanation, in no way limit the incorporation of the equal work standard in the manner suggested by the Ninth Circuit. Neither the Bennett Amendment, §1604.7(a), nor General Counsel's official explanation of §1604.7(a) state that the equal work standard was incorporated into Title VII only when a plaintiff believed she could meet that standard. Rather, the above opinion letter states that by virtue of the Bennett Amendment the definition of sex-based wage discrimination contained in the Equal Pay Act became the definition for sex-based wage discrimination under Title VII. The Ninth Circuit failed to even discuss the key second sentence of §1604.7(a). The Third Circuit's view of 29 C.F.R. §1604.7(a) wa also erroneous. The Third Circuit panel suggested, referring to the third sentence of §1604.7(a), that the EEOC viewed Title VII as having a broader standard of sex-based wage discrimination than the equal work standard. However, it is clear from both §1604.7(a) and General Counsel Duncan's
(cont.)

On March 1, 1966, General Counsel Duncan issued an opinion letter responding to an inquiry as to whether it would violate Title VII to pay women employees more than men employees because of a minimum wage law applicable only to women. App. C. General Counsel Duncan opined that the minimum wage law would not provide a justification for violating Title VII prohibitions, but he made clear that the Title VII prohibition concerning sex-based compensation discrimination would only apply if the women employees had received lower wages than men for performing equal work:

> "The Commission takes the position that the existence of a state or local minimum wage law applicable to employees of only one sex is not a justification for differences in compensation

(cont.)
December 29, 1965 opinion letter that the third sentence of §1604.7(a) only referred to the differences in employee coverage of the two statutes (i.e., where particular types of employees, such as executive, administrative or professional employees were covered under Title VII although not under the Fair Labor Standards Act), not to the standard applicable for adjudicating sex-based wage discrimination.

> based on sex which would otherwise be unlawful under Title VII. Accordingly, where an employer pays a certain wage to employees of one sex in order to comply with such a law, he must also pay the same rate to employees of the opposite sex for equal work." (emphasis added). App. C.

EEOC General Counsel Duncan issued another opinion letter on May 19, 1966, responding to a somewhat similar fact situation posed by the Special Assistant to the Solicitor of the United States Department of Labor concerning compliance with Title VII in states having minimum wage laws applying only to women. EEOC General Counsel Duncan was again of the opinion that a Title VII violation concerning sex-based compensation discrimination could only occur if men and women were performing the same work for different pay. In expressing that official opinion, EEOC General Counsel relied upon and explained the EEOC's official guideline, 29 C.F.R. §1604.7, as follows:

> "It follows that an employer covered by Title VII may not pay a male less than the California minimum wage while paying the statutory rate to a woman for the

same job. Furthermore, we take the position that he may not refuse to hire a woman for a job because state law would require him to pay her more than he is presently paying males. 29 C.F.R. 1604.1(c)(2). On the other hand, it must be conceded that so long as no woman is in fact employed in a given job category, it is not unlawful for an employer to pay male workers less than he would have to pay a woman if she were employed, for we read the Equal Pay Act and the Administrator's interpretation thereunder to forbid actual and not hypothetical differentials, and, whatever the general rule may be under Title VII, the Bennett Amendment compels us to apply the same test for differences in compensation based on sex, 29 C.F.R. 1604.7." App. D.

On July 23, 1966, EEOC Commissioner Samuel C. Jackson issued an official opinion addressing an inquiry as to whether a seven cent pay differential between male and female employees would violate Title VII. Commissioner Jackson responded as follows, quoted in pertinent part (reproduced from BNA Daily Labor Reports No. 171, pages A-3 to A-4 (September 1, 1966)):

"Your letter of July 7, 1966, requested an opinion on whether Title VII of the Civil

> Rights Act of 1964 is violated by a rate for female laborers seven cents per hour below the rate for male laborers.
>
> "Assuming that male and female laborers perform the same functions (as the job classifications tend to indicate), a wage differential would violate the Act [Title VII]. Maintenance of the two job classifications based on sex would in itself be a violation unless there is a functional difference in the two job categories." (emphasis added) App. E.

Like the above-quoted opinion letters of the EEOC General Counsel, EEOC Commissioner Jackson made it quite clear that a wage differential between a job performed by women and one performed by men would not violate Title VII unless the men and women were performing equal work.

On June 6, 1967, EEOC Acting General Counsel Holbert issued an opinion to the Director of the Commission's Albuquerque, New Mexico office explaining the meaning of the Bennett Amendment, including the EEOC's interpretation of the wage differentiations "authorized" by the Bennett Amendment. Acting General Counsel Holbert made clear that

the Equal Pay Act's equal work standard (i.e., equal skill, effort, responsibility, and working conditions), as well as the Equal Pay Act's affirmative defenses (i.e., seniority systems, merit systems, etc.) were incorporated by the phrase "authorized" in the Bennett Amendment. That opinion states:

> "Differentiations which are authorized under said Section [703(h)] are differentiations on the basis of skill, effort, responsibility and working conditions, and differentiations related to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor than sex.
>
> "It is the interpretation of those provisions that requires harmonization between Title VII and the Equal Pay Act amendment to the FLSA, because these are the provisions which, within the meaning of Section 706(h) [703(h)], 'authorize' differentiations," (emphasis added). (App. F)

Thus, starting in 1965, shortly after Title VII was enacted and the EEOC was organized and staffed, and continuing at least until mid-1967, the Commission's official interpretation of

the Bennett Amendment was that it incorporated the Equal Pay Act's equal work standard as the standard for proving sex-based compensation discrimination claims under Title VII.54/

Sometime after mid-1967 the EEOC apparently began to change its position and, on April 5, 1972, issued revised guidelines on sex discrimination. The 1972 guideline is very unclear in regard to the matter at issue here.55/ The

54 The opinions discussed supra show that the Ninth Circuit in this case (Pet. App. 9a) and the Third Circuit in IUE v. Westinghouse, supra, 23 F.E.P. Cases at 593, erred in interpreting the word "authorized" in the Bennett Amendment as incorporating only the Equal Pay Act's affirmative defenses into Title VII, but not the Equal Pay Act's equal work standard. The opinions are reprinted as appendices in the form obtained from the EEOC. These opinions were obtained from the EEOC's files after the decision of the Third Circuit, which accepted the representation made at the oral argument therein, by the EEOC's General Counsel appearing as amicus, to the effect that the EEOC had never interpreted the Bennett Amendment as adopting the equal work requirement.

55 Unlike the 1965 guideline, the 1972 guideline, set forth at App. A, does not discuss the standards necessary to prove sex-based compensation claims. 29 (cont.)

1972 guideline does not mention the equal work standard or any other standard of proof regarding sex-based compensation claims.[56/] But in any event, the EEOC now apparently takes the position that the Bennett Amendment incorporates only the affirmative defenses but not the equal work stan-

(cont.)
C.F.R. §1604.8. That 1972 guideline does state that: "By virtue of section 703(h) a defense based on the Equal Pay Act may be raised in a proceeding under Title VII." The guideline notes that even in considering such a defense, the EEOC would not consider itself bound by the Department of Labor's interpretation of the Equal Pay Act. The 1972 guideline, in paragraph (a), retains a similar provision to that in the 1965 guideline which stated that employees not covered by the Fair Labor Standards Act would nevertheless be covered employees if they fell within Title VII's employee coverage.

56 Actually, according to the EEOC's own regulations, only views expressed in prior Commission pronouncements which were "inconsistent" with the 1972 guidelines were intended to be overruled by the 1972 guidelines. 29 C.F.R. §1604.1(b). Since the 1972 guideline does not mention any standard of proof for sex-based compensation claims, it might not be viewed as overruling the 1965 guideline, which does state that the "standards of 'equal pay for equal work'" were the standards applicable to Title VII.

dard.57/ However, the EEOC's current views in no way reduce the weight which should be given to the EEOC interpretation which was contemporaneous with enactment of Title VII and which supports the County, as discussed supra.

The situation of the EEOC later taking a position in conflict with its official contemporaneous interpretation of Title VII is similar to situations presented to this Court in the General Electric case. In General Electric, supra, the EEOC's General Counsel Duncan stated in a 1966 opinion letter that the exclusion of pregnancy related disabilities from a salary continuation program did not violate Title VII. In 1972, the EEOC issued revised guidelines stating that the exclusion of pregnancy related disabilities from salary continuation programs did violate Title VII.58/ This Court gave deference to

57 The EEOC took that position in the briefs and oral argument it submitted in the Third Circuit in IUE v. Westinghouse.

58 These were part of the same revised sex discrimination guidelines which contained the reference to raising defenses based on the Equal Pay Act which was discussed supra at n. 55.

the 1966 opinion issued by the General Counsel, and held that the EEOC's 1972 guideline did not "fare well" under the Court's longstanding approach to according deference to agency determinations because (1) "[i]t is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title" and (2) "[m]ore importantly, the 1972 guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." 429 U.S. at 142. As in General Electric, the current position of the EEOC does not "fare well" when compared with prior 1965 guidelines and the opinions discussed supra, which were issued in 1965, 1966, and 1967. First, the current EEOC interpretation of the Bennett Amendment is not a contemporaneous interpretation of Title VII. Second, the EEOC's current position that the Bennett Amendment incorporated only the affirmative defenses, not the equal work standard, "flatly contradicts" the 1965 guidelines and the opinion letters discussed above. The 1965 guidelines

and the above-quoted opinions explicitly support the view that the Bennett Amendment was intended to adopt the equal work standard and not merely the affirmative defenses of the Equal Pay Act. They make clear that §703(h) "incorporates the definition of discrimination in compensation found in the Equal Pay Act." General Counsel's Opinion letter dated December 29, 1965.

These contemporaneous interpretations, issued as they were shortly after Title VII was enacted, no doubt were based upon and reflect the Congressional intent and legislative history relating to Title VII and the Equal Pay Act, which was discussed in the preceding sections of this Brief. Such a contemporaneous interpretation is more likely to reflect the desire of Congress than interpretations issued several years after enactment of the statute. General Electric, supra; Udall v. Tallman, supra.

Even absent the 1965 regulation and the 1965-1967 opinions, which support the County, the EEOC's present view of the Bennett Amendment would not be entitled to deference for the separate

reason that application of that interpretation would be "inconsistent with an obvious Congressional intent not to reach the employment practice in question. Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.' [citations omitted]." Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973). Accord: Morton v. Ruiz, 415 U.S. 199, 237 (1974).

V. FIVE OF THE SIX OTHER CIRCUITS THAT HAVE CONSIDERED THIS ISSUE ARE IN ACCORD WITH THE POSITION URGED BY PETITIONER

In Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971), the plaintiff claimed she was denied a higher level of compensation because of her sex (due to the discriminatory refusal of a security clearance to enter a restricted area of the plant). 448 F.2d at 118. Regarding the compensation claim, Ammons held that "to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal' work." 448 F.2d at 120 (emphasis added). It had been earlier noted in Ammons that Title VII

was to be construed in pari materia with the Equal Pay Act and that both statutes served the "same fundamental purpose." 448 F.2d at 119. Accordingly, the Tenth Circuit analyzed plaintiff's compensation claim against the equal work standard and held that plaintiff had not sustained "her burden of showing that she was paid less than others performing 'substantially equal work,'" 448 F.2d at 120. In Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980), cert. denied, 49 U.S.L.W. 3250 (October 6, 1980), the Tenth Circuit recently held that the plaintiffs (nurses) could not establish a claim of sex discrimination in wages because they could not show a differential in pay based on sex for performing equal work. The Tenth Circuit refused to venture into "the whole new world" of wage claims not meeting the equal work standard, relying upon (1) Congress' rejection of the "comparable work approach" in the Equal Pay Act in favor of the equal work standard, and (2) the Bennett Amendment, as well as the Congressional intent concerning that Amendment. 620 F.2d at 229-30.

In Orr v. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), cert. denied, 423 U.S. 865 (1975), a Title VII case claiming intentional sex discrimination in setting of wage rates, the Fifth Circuit set forth the following principles: (1) Title VII must be construed in harmony with the Equal Pay Act [citing, inter alia, the Equal Pay Act, Ammons, and the language of §703(h)]; (2) "To establish a case under Title VII it must be proved that a wage differential was based upon sex and that there was the performance of equal work for unequal compensation" (citing Ammons); and (3) finally the Fifth Circuit quoted a passage from one of its prior decisions under the Equal Pay Act which holds that for a wage claim to be established, the job content of the jobs in questions must be "virtually identical." Since the plaintiff in Orr had admitted that her job was different than jobs performed by men, the Fifth Circuit held that she was not entitled to relief under Title VII as a matter of law. 511 F.2d at 171. Calage v. University of Tennessee, 544 F.2d 297 (6th Cir. 1976), affirmed the district court's applica-

tion of the "equal work" standard by reason of the Bennett Amendment [400 F. Supp. 32, 37-39 (E.D. Tenn. 1975)] and cited Orr with approval, although the Sixth Circuit noted that plaintiff was not contesting that legal standard on appeal.

The Fourth Circuit has recently reaffirmed its position that Title VII sex-based wage rate claims must meet the equal work standard. In Stastny v. Southern Bell Telephone & Telegraph Co., 628 F.2d 267, 281, (4th Cir. 1980), the district court had found the employer liable under Title VII for wage discrimination based on comparisons of average female earnings and average male earnings within broad salary classifications. Id. However, since female plaintiffs did not show that their actual jobs were substantially equal to jobs performed by men, involving equal skill, effort, responsibility and similar working conditions, the Fourth Circuit reversed the finding of liability, holding that plaintiffs' wage claims suffered from a "total failure of proof," relying upon the Bennett Amendment, as well as Orr, Ammons, and

on earlier decision of the Fourth Circuit. The Eighth Circuit also has held, contrary to the Ninth and Third Circuits, that the doctrine of in pari materia statutory construction applies and that the provisions of Title VII regarding sex discrimination in the area of compensation must be construed in harmony with the Equal Pay Act. DiSalvo v. Chamber of Commerce, 568 F.2d 593, 596 (8th Cir. 1978), citing Ammons, supra, and Orr, supra.

Thus, most of the Circuits which have considered the issue have found that the Equal Pay Act's "equal work" standard is the applicable standard which must be met by plaintiffs asserting sex-based wage rate claims under Title VII.59/

VI. THE LEGAL RULE OF LIMITING WAGE DISCRIMINATION CLAIMS TO SITUATIONS INVOLVING "EQUAL WORK", WHILE PROVIDING EQUAL ACCESS TO ALL JOBS, IS SUPPORTED BY SOUND POLICY CONSIDERATIONS.

Not only the statutory language, legislative history, principles of

59 There are numerous district court decisions under Title VII which have

statutory construction, contemporaneous administrative regulations and opinions, and the majority of the circuit decisions in point reject Respondents' approach. Sound policy considerations also militate against the Ninth Circuit's interpretation.

Respondents have contended that the difference in pay between their job and the Corrections Officer job was not commensurate with the relative difficulty of the two jobs but that, rather, was explicable by the sex of the incumbents. Without delineating the standards to be followed the Ninth Circuit has remanded for the purpose of such an analysis. Under this approach the pay structure of virtually every employer

(cont.)
similarly limited the scope of federal court adjudications to equal work situations. E.g., Kohne v. IMCO Container Co., 480 F. Supp. 1015 (W.D. Va. 1979); Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252 (N.D. Ind. 1977); Cullari v. East-West Gateway Coordinating Council, 457 F. Supp. 335 (E.D. Mo. 1978); Chapman v. Pacific Tel. & Tel. Co., 456 F. Supp. 65 (N.D. Cal. 1978); United States v. City of Milwaukee, 441 F. Supp. 1371 (E.D. Wis. 1977); Molthan v. Temple University, 442 F. Supp. 448 (E.D. Pa. 1977).

and the entire economy would be at risk and subject to scrutiny by the federal courts. There are countless jobs predominantly performed by women which are not high paying.60/ Any woman who holds a job predominantly performed by women and who is dissatisifed with her wage rate could file a Title VII suit claiming sex-discrimination, cause the federal court to analyze the difficulty of her job compared to the difficulty of whatever higher paying jobs performed by a man or men that plaintiff selects, and request that the federal court adjust plaintiffs' wage rate to a higher level, although not necessarily as high as that of the comparison job. Obviously men could also file such suits. Presumably whenever the employer (or the Court)

60 E.g., women represent 97.8% of all Registered Nurses, 94.5% of elementary school teachers, 69% of retail sales clerks, 76.6% of all clerical workers (including bank tellers, bookkeepers, file clerks, secretaries, etc.), 96% of seamstresses, 98% of child care workers, 96% of maids, 82.9% of food servers (waitresses), and 87.6% of all health service workers. See 1975 Handbook on Women Workers, U.S. Department of Labor, Bulletin 297 (1975) at 89-91.

would set new wage rates, new claims could be filed by other groups of employees whose rate relationship has been altered and the process would start all over again.

But Respondents' particular claim is just the tip of the iceberg. For Respondents to be able to assert their claim, the equal work limitation has to be read out of Title VII. If that limitation would not apply, Title VII plaintiffs could draw any type of comparison imaginable concerning job duties and pay between any job predominantly performed by women and any job predominantly performed by men. Until the decision below, the federal courts without exception had been rejecting claims of sex discrimination in setting wage rates which did not meet the equal work standard.[61] Absent

61 See, e.g., Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), cert. denied, 434 U.S. 904 (1977) (claim based on a statistical comparison of male and female faculty members); Calage v. University of Tennessee, 400 F. Supp. 32 (E.D. Tenn. 1975), aff'd, 544 F.2d 297 (6th Cir. 1976) (claim based on a salary comparison of a job held by a woman and a job held by a man at the same level on (cont.)

the equal work limitation a torrent of litigation is likely to fill the courts. Such claims will envelop the federal judiciary in virtually unsolvable problems. Is the wage differential between the female receptionist and the male sales manager justified, or was the sex of the occupants somehow a factor? Should nurses have been paid as much as accountants and other professionals or was their work undervalued because it is a female occupation? Should the nurses have been paid more than accountants? Accountants deal with numbers, nurses with lives? All of these questions and problems, plus many more, will flood the federal system if the equal work requirement is eliminated from Title VII.

The federal courts would have to become job evaluation tribunals. Eventually, if not immediately, the

(cont.)
the University's organization chart); Lemons v. City & County of Denver, 620 F.2f 228 (10th Cir. 1980), cert. denied, 49 U.S.L.W. 3250 (Oct. 6, 1980) (claim that nurses should be paid the same as accountants and buyers and that the market system itself discriminates against females).

federal courts would become a prime regulator (if not the prime regulator) of many wage rate relationships between different types of jobs, for the simple reason that there still are strong sexual preferences for different types of jobs.62/ If the equal work limitation is removed, after wage relationships between jobs have been set by collective bargaining, or by whatever means, disgruntled groups of employees (male or female) or the union could then seek still higher pay from the federal

62 A recent study of occupation preference sponsored by the United States Department of Labor concluded that women have entered lower paying occupations as a matter of their own preference (shaped before they even enter the job market) and not by reason of employment discrimination. Years for Decision, Vol. 4 (1978), U.S. Dept. of Labor, Employment Training Administration. As a result of the study the Director of Research and the Employment Training Administrations's office of Research and Development concluded that: "Despite affirmative action programs and publicity on the career success of women in stereotypical male positions, most women have not changed their career aspirations. They continue to plan careers in traditionally female positions. As a result, they continue to occupy lower paying positions. Id. at iii.

judiciary. Women could voluntarily elect not to move to a higher paying job (e.g., one involving poor working conditions, physical effort, or some other aspect they do not like) but still seek the high pay level of that job.

Quite obviously, however, the federal courts are not equipped to deal with such questions of job evaluation, nor, as set forth supra, did Congress ever intend the courts to even try to adjudicate such claims.63/

The social and political sensitivity of the federal government setting an employer's wage rates is repeatly reflected in the legislative history set forth in prior sections of this Brief. It is at least as important a question today as it was in the 1960's. The limited involvement permitted by the

63 To say the least, the trial judges who have been asked to adjudicate Title VII sex-based wage claims which have not met the equal work standard have been, with good reason, decidedly unenthusiastic about becoming involved with such complex, and in many cases esoteric, questions. See e.g., Lemons v. City and County of Denver, 17 F.E.P. Cases 906, 910-911 (D. Colo. 1978); Kohne v. Imco Container Co., 480 F. Supp. 1015, 1039 (W.D. Va. 1979).

Equal Pay Act and the Bennett Amendment does not create such problems since the federal courts are not really determining the wage rate that is appropriate for any job, but merely assuring that all persons doing the same job get the same wage rate. However, if the equal work standard is abandoned, the courts will be determining what wage level is appropriate for particular jobs. For example, the Matron job here was found by the Ninth Circuit to not be substantially equal to the Corrections Officer job and thus, legitimately could be paid less -- but the trial court would have to determine how much less.

In addition, various economists have predicted that federal court involvement in an employer's wage structure under a comparable work approach, or some other approach which goes beyond the equal work standard, will have serious economic consequences.64/

64 Although it is difficult to fully quantify these effects, it appears likely that they will include the counterproductive effects of: (a) raising wage levels for some jobs above their rate of marginal revenue product, (cont.)

Within state and local governments the economic consequences merge with political ones. Local government budgets are heavily oriented toward employee wages and benefits.65/ At the same time, the total dollars available to provide services sought by the public are limited and there is no profit factor that can be adjusted as a source of additional funds. Consequently, any external force that increases labor costs to local governments is likely to result in a reduction of the services that can be provided. Women in

(cont.)
(2) causing at least some unemployment of women in those occupations where the wage level is increased, (3) removing the incentive for movement by women to jobs traditionally held by males, and (4) creating a disequilibrium in the allocation of jobs in that wages for an occupation would be raised at the same time that the quantity of labor demanded is lowered. Lindsay, Equal Pay for Comparable Work: An Economic Analysis of a New Antidiscrimination Doctrine (1980), at 33-34; Hildebrand, "The Market System" in Comparable Worth: Issues and Alternatives (E.R. Livernash ed. 1980), at 102-06.

65 David T. Stanley, in his Brookings Institution study entitled, Managing
(cont.)

the governmental job market will experience the same counterproductive effects felt in the private sector. But in addition, difficult political decisions will have to be made between public services retained and those abandoned as a direct result of wage adjustments brought about by federal involvement.

Because of the serious social, political, and economic considerations involved, many of which have not yet been fully studied, we believe that Respondents' request that the judiciary

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Local Governments Under Union Pressure (1974), has noted (p. 19):

> "[A]ccording to a variety of analysis, one-half to three-fourths of local government expenditures go to wages and benefits. 'It is well to remember,' says one analyst, 'that more than seventy percent of the operating budget of a typical local government is for personnel.' Another reminds us that personnel costs account for about three-fifths of New York's expense budget. The exact portion of the budget varies according to how capital costs and operating expenses are categorized, but employees clearly receive a major share of the money spent by cities and counties."

became involved in situations outside the equal work approach is really a request for a piece of social legislation.

In the early 1960's Congress formed a judgment that the role of the federal judiciary in the setting of wage rates would be a limited one, although the role of the judiciary in assuring equal access to all jobs would be extensive. We believe that that judgment was correct. Most of the barriers to access to jobs have been removed or are in the process of being removed. Presumably there eventually will be a reduced need for federal intervention to guarantee that access.

On the other hand, if the federal judiciary is drawn into the function of comparing the value of different jobs and the setting of wage rates, they may never withdraw from that function. Federal setting of wage rates for different jobs or adjudicating the wage differential that would be permissible between two different jobs strikes to the very heart of the type of nation which will exist in future years.

Thus, we believe that Congress in 1963 and 1964 made the correct decisions to provide extensive federal involvement to assure access to all jobs but only a limited role in the setting of wage rates. But, even if Congress was wrong in the decisions it made in 1963 and 1964, we believe it is the function of that body to decide whether to now involve the federal judiciary in the setting of wage structures.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the opinions and order entered by the United States Court of Appeals for the Ninth Circuit in this matter be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

1. SECTION 703(A) OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §2000E-2(A) (1976):

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin or;

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. SECTION 703(H) OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42

U.S.C. §2000E-2(H) (1976):

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to

employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

3. EQUAL PAY ACT OF 1963, 29 U.S.C. §206(d)(1) (1976):

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any

employee.

4. EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C.F.R. §1604.7 (1965), ORIGINALLY PUBLISHED IN 30 FED. REG. 14928 (DEC. 2, 1965):

Relationship of Title VII to the Equal Pay Act

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by

section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) Accordingly the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, Part 800.119-800.163. Relevant opinions of the Administrator interpreting "the equal pay for equal work standard" will also be adopted by the Commission.

(c) The Commission will consult with the Administrator before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

5. EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C.F.R. §1604.8 (1979), ORIGINALLY PUBLISHED IN 37 FED. REG. 6836 (APRIL 5, 1972):

Relationship of Title VII to the Equal Pay Act

(a) The employee coverage of the prohibitions against discrimina-

tion based on sex contained in title VII is coextensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.

(c) Where such a defense is raised, the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

APPENDIX B

December 29, 1965
[GC-665-65]

W. R. McCabe and Associates
1416 Westwood Boulevard, Suite 7
Los Angeles, California 90024

Attention: Mr. Sidney R. Catsiff

Dear Mr. Catsiff:

This is in reply to your letter of December 13, 1965, in which you ask who is the enforcement agency for those employees who may have complaints concerning pay discrimination, but who are exempt from coverage under the Fair Labor Standards Act.

The Commission, as indicated in section 1604.7 of the Guidelines issued November 24, 1965, 30 F.R. 14928, has decided that Section 703(h), Title VII of the Civil Rights Act of 1964 incorporates the definition of discrimination in compensation found in the Equal Pay Act, including the four enumerated exceptions, but that Section 703(h) was not intended to recognize for purposes of Title VII the various exemptions to the coverage of the Fair Labor Standards Act found elsewhere in that statute.

Therefore, where a charge of discrimination in compensation on grounds of sex involves an employee covered by both the Fair Labor Standards Act and Title VII, the Wage-Hour Administrator and this Commission have concurrent jurisdiction, but where the employee is exempted from the Fair Labor Standards Act but covered by Title VII, this Commission is the appropriate enforcement agency.

Sincerely yours,

SMBach/RKBerg:aee:12/23/65

Charles T. Duncan
General Counsel

cc: Chron
Subject
EXSEC (2)

APPENDIX C

March 1, 1966
[GC-227-66]

[Addressee name deleted by EEOC]

Your letter of February 21, 1966 to the President's Committee on Equal Employment Opportunity has been referred to this Commission for reply. You state that you are presently paying your male and female workers $1.25 an hour. You state further that the District of Columbia minimum wage for women workers has been raised to $1.40 an hour. You ask whether it will be unlawful discrimination under Title VII of the Civil Rights Act of 1964 if you pay your women workers $1.40 an hour pursuant to the District of Columbia regulation, while you continue to pay your male workers $1.25 an hour.

The Commission takes the position that the existence of a state or local minimum wage law applicable to employees of only one sex is not a justification for differences in compensation based on sex which would otherwise be unlawful

under Title VII. Accordingly, where an employer pays a certain wage to employees of one sex in order to comply with such a law, he must also pay the same rate to employees of the opposite sex for equal work. The position taken by the Commission on this question is consistent with the position already taken by the Wage-Hour Administrator under the Equal Pay Act of 1963, 29 C.F.R. 800.161.

Sincerly yours,

Charles T. Duncan
General Counsel

RKBerg:cbe 2/28/66

cc: Chron; Subject; Charles Donahue, Solicitor of Labor

APPENDIX D

Mr. Henry Rose
Special Assistant to the Solicitor
Department of Labor
Washington, D.C.

Dear Mr. Rose:

In your memorandum of January 21, 1966, you pose the following problem:

The California minimum wage law prescribes a minimum wage of $1.30 an hour for women, but not for men. You state that the California State Employment Service may not refer women to jobs which pay less than $1.30 an hour, nor may it refer individuals to employers who pay employees of one sex less than employees of the other sex when both are performing equal work. (We assume that this is a matter of State policy and not a requirement the Employment Service infers from Title VII.) In this situation is it a violation of Title VII for the California Employment Service to refer only men to jobs paying less than $1.30 an hour?

The Wage-Hour Administrator has taken the position that where a State minimum wage for women is higher than

the Federal minimum wage, the employer paying the higher wage to women must pay the higher rate to male employees doing equal work in order to comply with the Equal Pay Act. 29 C.F.R. 800.161 The Equal Employment Opportunity Commission likewise takes the position that under Title VII the necessity to comply with a State minimum wage law applicable to only one sex does not justify a differential in compensation on account of sex.

It follows that an employer covered by Title VII may not pay a male less than the California minimum wage while paying a statutory rate to a woman for the same job. Furthermore, we take the position that he may not refuse to hire a woman for a job because state law would require him to pay her more than he is presently paying males, 29 C.F.R. 1604.1(c)(2). On the other hand, it must be conceded that so long as no woman is in fact employed in a given job category, it is not unlawful for an employer to pay male workers less than he would have to pay a woman if she were employed, for we read the Equal Pay Act and the Administrator's interpretations

thereunder to forbid actual and not hypothetical differentials, and, whatever the general rule may be under Title VII, the Bennett Amendment compels us to apply the same test for differences in compensation based on sex. 29 C.F.R. 1604.7.

It appears to us clear, therefore, that the California State Employment Service may not refer only men to jobs which pay less than $1.30 an hour where the employer is covered by Title VII. (We assume for purposes of this discussion that the jobs are not those for which sex is a bona fide occupational qualification.) Although the offered wage is less than $1.30, the conjunction of Title VII and State law forces the employer both to hire a qualified woman applicant and to pay her the State minimum. Therefore, the Employment Service may and should assume that the employer will comply with his legal duties. Furthermore, if he does not, the onus will be on him, whereas under its present course of action the Employment Service is apparently insulating employers against liability for discriminatory practices, and this is the

very evil that Congress sought to correct by preventing discriminatory referrals by employment agencies. We recognize that the present policy of the Employment Service is motivated by the legitimate desire to avoid exposing women workers to the likelihood of exploitation at substandard wages; but to the extent that this State policy conflicts with the non-discrimination requirements of Title VII it must yield. Furthermore, the Employment Service is not left without avenues to enforce its policy, for Title VII leaves it an option. It may either refuse all referrals to jobs paying less than $1.30, or it may refer men and women without discrimination. Furthermore, if it chooses the latter course, it may inform the employers of the requirements of State law and Title VII, and, perhaps, inform the agency which enforces the minimum wage law of the possibility of future violation by the employer.

Where the employer is not covered by Title VII we have a more difficult case. Generally, the Commission takes the position that the prohibition of section 703(b) is applicable to all

referrals, etc., by an employment agency and is not limited to the agency's dealings with covered employers. This construction is not only consistent with a literal interpretation of the statute, but has a policy justification as well. For even where an employer not covered by Title VII places a discriminatory job order, he may, when confronted by a qualified applicant, be persuaded that his basis for discrimination was unfounded. However, where an employer not covered by Title VII proposes to pay substandard wages, it is difficult to see what purpose would be served by requiring that women applicants be referred to him, and we believe that in this circumstance the State policy against referral of women workers should be permitted to prevail. Accordingly, we would not regard it as a violation of Title VII for the California State Employment Service to refer only men to jobs paying less than $1.30 an hour where the employer is not covered by Title VII.

Sincerely yours,

Charles T. Duncan
General Counsel

RKBerg:aee:5/4/66

APPENDIX E

July 23, 1966

Your letter of July 7, 1966, requested an opinion on whether Title VII of the Civil Rights Act of 1964 is violated by a rate for female laborers seven cents per hour below the rate for male laborers.

Assuming that male and female laborers perform the same functions (as the job classifications tend to indicate), a wage differential would violate the Act. Maintenance of the two job classifications based on sex would in itself be a violation unless there is a functional difference in the two job categories.

While a discriminatory wage rate is a continuing violation, a charging party would not be entitled to back pay for any period earlier than ninety days prior to the filing of the charge. In addition, the wage differential in question may violate the Equal Pay provisions of the Fair Labor Standards Act. If it does so, a complaining party may be entitled to back pay for up to

two years.

Enclosed is a form for a charge which you may wish to file with this Commission. Also, I suggest that you write to Mr. Clarence T. Lundquist, Administrator, Wage and Hour Division, Department of Labor, Washington, D.C. concerning the equal pay aspects of your complaint.

Should you have any further questions, please do not hesitate to contact the Commission.

Sincerly yours,

Samuel C. Jackson
Commissioner

Enclosure

[Reproduced from BNA Daily Labor Reports, No. 171, pages A-3 to A-4 (Sept. 1, 1966)]

APPENDIX F

UNITED STATES GOVERNMENT
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

MEMORANDUM

DATE: Jun. 6, 1967
In reply refer to:

TO:
Tom E. Robles
Director, Albuquerque RO

FROM:
Kenneth F. Holbert
Acting General Counsel

SUBJECT:
Applicability of Section 800.108 of Administrators Interpretative Bulletin on Equal Pay for Equal Work, Part 800 to Proceedings under Title VII of the Civil Rights Act of 1964 in Light of the Commission Guidelines on Sex Discrimination, Part 1604 Commission Procedural Regulations, Section 1604.7

The following question has been raised before your office: A privately-owned public utility operating within your region has multiple offices. A charge of discrimination has been filed by a female employee operating in one office building in a large city. The basis of the charge is that she is paid less for performing similar work to that performed by male employees

because of her sex. The male employees with whom she is being compared are employed in a separate building which is located approximately two miles away from the site of the employment of the Charging Party. Under the above-cited Interpretative Bulletin of the Administrator, Wage and Hour Division, as explained in the Administrative Opinion of the Administrator of June 17, 1966, (BNA, FEP 401:-739), and as applied by the Administrator in similar situations, the male employees are located in a separate establishment from the female employee within the meaning of the Equal Pay provision of the Fair Labor Standards Act. Therefore, no comparison of the wages of said male and female employees may be made for the purposes of determining a violation of the Equal Pay provisions of the FLSA.

You raise the question whether the concept of "establishment" and related administrative interpretations and opinions under the Equal Pay provisions of the FLSA constitute "relevant interpretations" within the meaning of Section 1604.7 of the Procedural Regulations of the Commission, so that the

commission is bound by said opinions and interpretations.

It is concluded that Section 800.108 of the Interpretative Bulletin of the Administrator and opinions issued thereunder do not constitute "relevant interpretations" within the meaning of the Commission Procedural Regulations cited above, and that in processing cases alleging discrimination in pay based on sex, the Commission is not restricted to a comparison of rates in the same "establishment" of a multi-establishment employer.

The "relevant interpretations" of the Equal Pay Act to which the Commission regulations speak are those dealing with the measurement process in determining whether there is equal pay for equal work, within the area in which the FLSA and the provisions of Title VII overlap. This means that in situations to which [both] statutes are applicable, the same standards and rules shall be applied to determine whether there is "equal pay for equal work". However, as Section 1604.7 of our Procedural Regulations suggests, the regulation was not intended to restrict the coverage of

Title VII to those situations where the FLSA is not applicable. The Equal Pay provisions of the FLSA are applicable only within the limits of an establishment as that term is used in the statute, and as it has been interpreted. The concept of an "establishment" is foreign to Title VII. Title VII contains no such limitation unless it is found in Section 703(h) which provides:

> It shall not be unlawful employment practice under this Title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the FLSA of 1938 as amended.

Differentiations which are authorized under said Section are differentiations on the basis of skill, effort, responsibility and working conditions, and differentiations related to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor than sex.

It is the interpretation of these

provisions that requires harmonization between Title VII and the Equal Pay amendment to the FLSA, because these are the provisions which, within the meaning of Section 706(h) [703(h)], "authorize" differentiations. The Equal Pay amendment does not authorize sex discrimination between employees in different establishments, within the meaning of Section 703(h).

It simply does not deal with such discrimination. No affirmative Congressional intent to authorize discrimination on the basis of sex between employees in different establishments may be read into Section 703(h), or into Section 1604.7 of the Procedural Regulations of the Commission. Accordingly, the concept of "establishment" and its interpretations and limitations are not applicable to proceedings under Title VII.